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No. 91-1225

In The

Supreme Court of the United States

October Term, 1991

MIDNIGHT SESSIONS, LTD. t/a AFTER MIDNIGHT, BAKER OCEAN, INC. t/a DOWN SOUTH, GOOD TIMES CAFE, INC., DONALD R. WELCH, SALLY HUNTER, JACK MANOFF, RICHARD SINGER and CURT E. HEIDINGER,

Petitioners,

vs.

CITY OF PHILADELPHIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Where a property owner obtains building and zoning permits for a specific use, completes construction and is granted a certificate of compliance with all codes and ordinances, does a municipality violate the property owner's right to due process when it subsequently prohibits the property owner's use of the completed project on the basis of an undisclosed, standardless municipal policy requiring neighborhood approval of the project?

2. Must a municipality act with an improper motive in enforcing an arbitrary and irrational municipal policy in order to be held liable pursuant to 42 U.S.C. § 1983?

3. Is a municipality's denial of a land use license a "final decision" for purposes of determining whether a substantive due process challenge is ripe under 42 U.S.C. § 1983?

4. Does arbitrary government action which deprives a person of a leasehold interest in property constitute a taking of property for which compensation is due?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Citations iii

Opinions Below 1

Jurisdictional Statement 2

Constitutional and Statutory Provisions Involved 2

Statement of the Case 4

Reasons for Granting the Writ 11

I. The Third Circuit's decision that a municipality may require a property owner to complete a construction project and then require the property owner to satisfy an unwritten, undisclosed, standardless policy requiring neighborhood approval is in conflict with decisions of this Court and other Circuit Courts. 11

II. The Third Circuit's decision that a municipality which acts arbitrarily and irrationally must also act with an "improper motive" before liability may attach pursuant to Section 1983 is contrary to decisions of this Court and other Circuit Courts. 14

Contents

Page

III. The Third Circuit's decision that the denial of a land use license does not constitute a final decision for evaluating substantive due process claims effectively eliminates the rule that a civil rights litigant need not exhaust its administrative remedies. 16

IV. The Third Circuit's decision that arbitrary government action that deprives a person of a leasehold interest in property is not a taking for which compensation is due is not in accordance with decisions of this Court. 18

Conclusion 19

TABLE OF CITATIONS

Cases Cited:

Alamo Land & Cattle Co., Inc. v. Arizona, 424 U.S. 295 (1976) 19

Allison v. Wilson, 434 F.2d 646 (9th Cir. 1970), cert. denied, 404 U.S. 863 14

Armstrong v. Manzo, 380 U.S. 545 (1965) 13

Barnes v. Merritt, 428 F.2d 284 (5th Cir. 1970) 12

City of Canton v. Harris, 489 U.S. 381 (1989) 15

Daniels v. Williams, 474 U.S. 327 (1986) 15

Eubank v. City of Richmond, 226 U.S. 137 (1912) 11, 12

Page

First Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987) 19

General Electric Company v. New York State Department of Labor, 936 F.2d 1448 (2d Cir. 1991) 12

Geo-Tech Reclamation Industries, Inc. v. Hambrick, 886 F.2d 662 (4th Cir. 1989) 12

Kerr v. Chicago, 424 F.2d 1134 (7th Cir. 1970) 14

Keystone Bituminous Coal Ass'n v. Duncan, 771 F.2d 707 (3d Cir. 1985), aff'd, 480 U.S. 470 (1987) 18

Logan v. Zimmerman Brush Company, 455 U.S. 422 (1982) 13

McCollum v. City of Powder Springs, 720 F. Supp. 985 (N.D. Ga. 1989) 12

Midnight Sessions, Ltd. v. City of Philadelphia, 945 F.2d 667 (3d Cir. 1991) 13, 14, 17, 18

Monell v. New York City Department of Social Services, 436 U.S. 458 (1978) 14, 15

Monroe v. Pape, 365 U.S. 167 (1961) 14, 15

Oklahoma City v. Tuttle, 471 U.S. 808 (1985) 15

Parratt v. Taylor, 451 U.S. 527 (1981) 13

Contents

Page

Patsy v. Florida Board of Regents, 457 U.S. 496 (1982) 16

Pembaur v. Cincinnati, 475 U.S. 469 (1986) 15

Raper v. Lucey, 488 F.2d 748 (5th Cir. 1973) 12

Roberts v. Williams, 456 F.2d 819 (5th Cir. 1971), cert. denied, 404 U.S. 866 14

Smithfield Concerned Citizens v. Town of Smithfield, 907 F.2d 239 (1st Cir. 1990) 17

St. Louis v. Praprotnik, 485 U.S. 112 (1988) 15

United States v. Petty Motor Co., 327 U.S. 372 (1946) 19

Washington ex rel Seattle Title Trust Company v. Roberge, 278 U.S. 116 (1928) 11, 12

Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985) 16, 17

Statutes Cited:

18 U.S.C. § 1961, et seq. 10

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1331 9

28 U.S.C. § 1343 9

42 U.S.C. § 1981 10

42 U.S.C. 1982 10

42 U.S.C. § 1983 ....i, 3, 4, 9, 14, 15, 16, 17, 18

42 U.S.C. 1985 10

42 U.S.C. 1986 10

42 U.S.C. 1988 ....2, 10

53 P.S. §§ 4731-4742 ....4, 5, 7

United States Constitution Cited:

Fifth Amendment 2, 3

Fourteenth Amendment, Section 1 ....3, 11, 12

Rule Cited:

Supreme Court Rule 29.1 6

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OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit (Greenberg, J.) is reported at 936 F.2d 1448 (3d Cir. 1991), and is reprinted in the appendix at 1a. The Third Circuit's order denying petitioners' petition for rehearing is unreported, and is reprinted in the appendix at p. 48a.

The memorandum and order of the United States District Court for the Eastern District of Pennsylvania (Newcomer, J.) denying respondent's motion for the entry of judgment notwithstanding the verdict, for a new trial, and to alter, amend, or remit the judgment, is not reported, and is reprinted in the appendix at p. 50a.

The memorandum and order of the United States District Court for the Eastern District of Pennsylvania (Newcomer, J.) denying in part and granting in part respondent's motion for summary judgment, is not reported, and is reprinted in the appendix at p. 64a.

The memorandum and order of the United States District Court for the Eastern District of Pennsylvania (Newcomer, J.), awarding petitioners' attorney's fees pursuant to 42 U.S.C. § 1988, is reported at 755 F. Supp. 652 (E.D. Pa. 1991), and is reprinted in the appendix at p. 97a.

JURISDICTIONAL STATEMENT

This Court has jurisdiction to review the judgment in question by writ of certiorari pursuant to 28 U.S.C. § 1254(1). The judgment sought to be reviewed was entered by the United States Court of Appeals for the Third Circuit on October 2, 1991. Rehearing was subsequently denied by order dated October 28, 1991.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V of the Constitution of the United States:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV, Section 1 of the Constitution of the United States:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Civil Rights Act, 42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights,

> privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit, in equity, or other proper proceedings for redress. For purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered a statute of the District of Columbia.

Pennsylvania's Dance Hall Act, 53 P.S. §§ 4731-4742, 1919, May 16, P.L. 193, is reproduced in the appendix at page 124a, due to its length.

STATEMENT OF THE CASE

The focus of this civil rights action is an unwritten municipal policy which regulates the issuance of "dance hall licenses" in the City of Philadelphia. Pursuant to this unwritten policy, an application for a dance hall license cannot be submitted to the City until the dance hall is fully constructed and the applicant has obtained a certificate of occupancy confirming compliance with all codes and ordinances. (R. 169a-173a, 222a). The applicant is then subjected to a standardless neighborhood approval process, whereby the applicant must obtain the consent of its neighbors before the City will issue the license. The applicant is never put on notice that neighborhood approval is a prerequisite to the issuance of the license.

The City delegates the responsibility for conducting this neighborhood approval process to its police department, which thereafter recommends to the City's Department of Licenses and Inspections ("L&I") whether the dance hall license should issue. L&I follows the police recommendation in all instances, even though the City Home Rule Charter requires L&I, the department charged with ensuring the satisfaction of building, health, and safety requirements, to rule on the issuance of all dance hall license applications. (R. 174a, 175a, 204a, 217a-220a, 225a).

The police formulate their recommendation through a neighborhood "survey", which consists of randomly knocking on five or ten doors in the neighborhood and asking those who answer if they object to the now-completed dance hall. (R. 205a-206a, 210a-211a). There are absolutely no standards to guide the police in conducting this survey, even though the City's Home Rule Charter requires the City to promulgate written standards for the grant or denial of a dance hall license. (R. 181a-182a). There is nothing which tells the police who to interview, how many people to interview, what to ask, and on what to base a positive or negative recommendation. (R. 180a, 181a-182a, 207a, 219a-220a). If even a few people object to the proposed dance hall — for good, bad or no reasons — the police recommend against the dance hall without analyzing issues of public health or safety, or compliance with law. (R. 176a-179a, 197a, 207a).

This unwritten municipal policy was purportedly adopted in furtherance of the City's investigative responsibilities pursuant to a 1919 Pennsylvania law known as the "Dance Hall Act," 53 P.S. §§ 4731-4732. Under the Dance Hall Act, the mayor of each city is required to investigate whether the proposed dance hall "complies with the rules, regulations, ordinances and laws applicable thereto". 53 P.S. § 4735. Furthermore, the Dance Hall Act states that no dance hall license shall be issued until it is ascertained "that the place for which it is issued complies with and conforms to all laws, ordinances, health and fire regulations, applicable thereto, and is a safe and proper place for the purpose for which it shall be used, properly ventilated and supplied with sufficient toilet conveniences." 53 P.S. § 4736.

Petitioners[1] sought to open two nightclubs in the City of Philadelphia, the linchpin of which was dancing to "rap" music. One nightclub, known as "After Midnight", was to be located in a dilapidated warehouse situated in an industrially-zoned area that permitted uses ranging from locomotive factories, to breweries, to meat-rendering facilities. Building and zoning permit applications, filed by petitioners and approved by the City, disclosed the *raison d'etre* of After Midnight to be "dancing" and included plans for a 12,000 square foot dance floor. (R. 132a-137a, 230a-243a). The other nightclub, known as "Down South", was to be located in a commercial area of the City where many nightclubs and bars were located, in the premises of an existing, licensed nightclub. (R. 162a, 214a). Petitioners sought and obtained the City's permission to renovate Down South, including a substantial enlargement of its dance floor.

After Midnight required extensive renovation and construction. Shortly after petitioners began this work, petitioners attempted to submit an application for their dance hall license in accordance with published City procedures. L&I refused to accept the application, advising petitioners that City policy required them to first obtain a certificate of occupancy. In order to obtain the certificate of occupancy, petitioners were required to complete all construction and satisfy all City codes and ordinances relating to building practices, health and safety. (R. 137a-138a, 169a-173a, 222a).

Believing that a dance hall license was a formality once City codes and ordinances were satisfied, petitioners thereafter spent over $1,000,000.00 in renovation and construction costs to complete After Midnight, and received their certificate of occupancy. At no time — before, during or after its operation — was After Midnight charged with a violation of any code or ordinance relating to health or safety. (R. 139a-140a, 141a-142a, 184a, 225a, 244a).

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[1] Neither Midnight Sessions, Ltd., Baker Ocean, Inc., nor Good Times Cafe, Inc. has parent companies, subsidiaries, or affiliates to list pursuant to Supreme Court Rule 29.1.

Petitioners then submitted their dance hall license application, as instructed. The City conceded that petitioners satisfied all objective criteria set forth in the Dance Hall Act, but denied the dance hall license on the basis of the police department's negative recommendation, which was predicated solely on "neighborhood objections". (R. 141a-146a, 152a-154a, 156a, 175a, 186a, 181a-182a, 223a-224a). Until this time, petitioners were unaware that the dance hall license could be denied on the basis of neighborhood objections; in fact, they had been told by City officials in a prior dance hall license proceeding that neighborhood approval was not a prerequisite to a dance hall license. (R. 130a, 131a, 147a-148a).

Although the City provided plaintiffs with a right of appeal to its Board of License and Inspection Review, there were no published guidelines or criteria regarding what the Board of License and Inspection Review considered. (R. 181a, 188a, 201a-202a, 202a-203a). Meanwhile, the City's Law Department and other City officials held private meetings with petitioners' neighborhood opponents, who had gained the ear of a prominent City councilman, advising them (but not the petitioners) that the Board would be influenced by vociferous shows of community opposition. (R. 147a-148a, 182a-184a, 228a). Consequently, at the Board hearing in May 1988, 50-60 sign-carrying opponents conducted a demonstration, while petitioners sat alone, expecting the hearing to focus on compliance with law. The Chairman of the Board later testified that his show of opposition, unmatched by a similar show of support, was highly influential in the Board's denial of the plaintiffs' appeal. (R. 149a, 189a-195a). It was not until December 1988 that After Midnight was granted another hearing before the Board. Now knowing the unwritten "rules of the game", petitioners brought their proponents and, resultantly, got their license, more than seven months after their original application. (R. 157a-159a).

This delay caused After Midnight to go out of business. During this period, petitioners were permitted to invite patrons to listen to music, but were required — under the watchful eye of City inspectors — to prohibit dancing. Consequently, After Midnight's customers went elsewhere, petitioners fell behind in their rent, filed for bankruptcy, and were evicted, losing their building rehabilitation investment in the process. (R. 153a-154a, 212a-213a, 159a-161a, 216a).

Down South suffered a similar fate. Petitioners originally opened Down South in early July 1988, through a separate corporation. It did not feature "rap" music, and operated for a few weeks, without City interference. (R. 164a-165a). Thereafter, petitioners thought they might be able to attract the many customers that had patronized After Midnight, now closed, if they changed to a "rap" format and advertised that Down South was "from the people who brought you After Midnight". The strategy worked, and Down South became a highly successful business. (R. 165a-166a, 215a).

Only then — when the connection between Down South and After Midnight became public — did the aforementioned City councilman become involved, telling the media that he would close Down South because it had "no redeeming social value". (R. 198a, 200a, 226a-227a). Immediately thereafter, despite having passed all prior City inspections, Down South received violation notices from L&I. (R. 199a-200a). The Chief of L&I's License Issuance Unit, Robert D'Agostino, told the press that the violations were "minor". (R. 187a). A short time later, however, on October 7, 1988, Mr. D'Agostino inexplicably told the petitioners that his Department was going to close Down South *that night,* with no prior notice or opportunity to be heard, as the result of these "minor" violations. (R. 164a-165a).

Petitioners advised Mr. D'Agostino that they disagreed with the violations with which they were charged — as recently as January 1988, Down South's predecessor had passed all City inspections, despite the same conditions for which Down South was now being cited. (R. 167a-419a). Petitioners advised L&I that if they were permitted to operate, they could afford to make the changes but, otherwise, they would be forced to go out of business. Mr. D'Agostino refused the request. (R. 167a-168a).

As the final nail in Down South's coffin, the City advised plaintiffs on October 14, 1988 that Down South's dance hall license would not be continued in effect for but one reason — "objection of neighbors". (R. 163a, 186a). Petitioners, now out of money, were unable to continue the fight. (R. 167a-168a, 216a).

Petitioners brought suit in the district court[2] pursuant to 42 U.S.C. § 1983, alleging that the City violated petitioners' substantive and procedural due process rights, and that the City's conduct resulted in an unconstitutional taking of petitioners' property.[3] Shortly before trial, the district court, per the Honorable Clarence C. Newcomer, denied the City's motion for summary judgment with respect to these claims.

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[2] Subject matter jurisdiction in the district court was predicated on 28 U.S.C. §§ 1331 and 1343. Petitioners originally brought suit against the City and numerous City officials. At trial, the City entered into a court approved stipulation with petitioners whereby the jury would be charged that the City was legally responsible for all acts and omissions of each member of the Board of License and Inspection Review, and individual defendants John Plonski, Robert D'Agostino, Clarence Mosley, and Cureley Cole, Esq. The City further agreed that it would make no contrary argument or contention on appeal, or in any subsequent proceedings. In return, petitioners agreed to dismiss all claims against the individual defendants.

The jury returned a verdict in favor of petitioners on all three claims, awarding $2,553,000.00 in damages to After Midnight and $522,000.00 to Down South.[4] The district court thereafter denied the City's motion for the entry of judgment notwithstanding the verdict, for a new trial, and to alter, amend, or remit the judgment. The district court also awarded attorney's fees to petitioners as prevailing parties pursuant to 42 U.S.C. § 1988.

On appeal, the Court of Appeals for the Third Circuit reversed the district court's denial of respondent's motion for a judgment notwithstanding the verdict on the issues of taking without just compensation, procedural due process, and Down South's substantive due process claim. With respect to After Midnight's substantive due process claim, however, the Third Circuit reversed and remanded for a new trial. The district court's award of attorney's fees was vacated.

On October 28, 1991, the Third Circuit denied rehearing.

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[3] Petitioners also advanced claims pursuant to 42 U.S.C. §§ 1981, 1982, 1985 and 1986 and the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.* The district court dismissed the 42 U.S.C. §§ 1985 and 1986 claims and RICO claim before trial.

[4] The jury found for the City on petitioners' claims under 42 U.S.C. §§ 1981 and 1982.

REASONS FOR GRANTING THE WRIT

I.

THE THIRD CIRCUIT'S DECISION THAT A MUNICIPALITY MAY REQUIRE A PROPERTY OWNER TO COMPLETE A CONSTRUCTION PROJECT AND THEN REQUIRE THE PROPERTY OWNER TO SATISFY AN UNWRITTEN, UNDISCLOSED, STANDARDLESS POLICY REQUIRING NEIGHBORHOOD APPROVAL IS IN CONFLICT WITH DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS.

This Court has consistently interpreted the Fourteenth Amendment to the United States Constitution as prohibiting the government from regulating private land use with standardless, neighborhood approval procedures. *See Washington ex rel Seattle Title Trust Company v. Roberge,* 278 U.S. 116 (1928); *Eubank v. City of Richmond,* 226 U.S. 137 (1912). Such schemes violate due process because they impermissibly delegate land use decisions to private individuals, who are free to arbitrarily deny an otherwise lawful land use for any reason, including self interest, bias, or unarticulated "not-in-my-backyard" sentiments. The Third Circuit not only endorsed this method of land use regulation, but also found that a property owner need not be put on notice of the scheme, after the property owner is induced to spend the funds required to complete what he is then forbidden to use.

In *Eubank, supra,* this Court struck down a Richmond ordinance that required the city's Building Committee to establish set-back lines for a given piece of property whenever requested to do so by two-thirds of the adjacent property owners. This Court reasoned that the ordinance violated due process because it conferred "the power on some property holders to virtually control and dispose of the property rights of others" and created no standard by which the adjacent property owners were to exercise this power. The adjacent property owners' decision could be based on their own self interest, or be totally capricious. *Eubank,* 226 U.S. at 143-44.

Similarly, in *Roberge, supra,* this Court struck down a Seattle zoning ordinance that allowed a home for the aged poor to be built in a particular area, but only if the consent of other property owners near the proposed building was first obtained. *Roberge,* 278 U.S. at 118. This Court reasoned that the decision of the nearby property owners was uncontrolled by any standard or rule prescribed by legislative action. Under the ordinance, the adjacent property owners were free to withhold their consent for selfish, arbitrary or capricious reasons. This Court found this system of land use regulation "repugnant to the due process clause of the Fourteenth Amendment." *Id.* at 121-22.

The Second and Fourth Circuits have recently reaffirmed the vitality of the *Eubank* and *Roberge* decisions. *See General Electric Company v. New York State Department of Labor,* 936 F.2d 1448 (2d Cir. 1991); *Geo-Tech Reclamation Industries, Inc. v. Hambrick,* 886 F.2d 662 (4th Cir. 1989).

Aside from the clear mandate of *Eubank* and *Roberge,* the City's failure to put petitioners on notice of its neighborhood objection policy is itself repugnant to all notions of due process. *See Raper v. Lucey,* 488 F.2d 748, 752 (5th Cir. 1973); *Barnes v. Merritt,* 428 F.2d 284 (5th Cir. 1970); *McCollum v. City of Powder Springs,* 720 F. Supp. 985 (N.D.Ga. 1989). This is especially true where, as here, petitioners were required to expend over $1,000,000.00 before they were even permitted to submit a license application. The City's unwritten policy is thus both substantively and procedurally infirm.

The Third Circuit held that the post deprivation appeal procedures available to petitioners satisfied procedural due process. *See Midnight Sessions, Ltd v. City of Philadelphia,* 945 F.2d 667 (3d Cir. 1991). However, this Court has held that post deprivation remedies do not satisfy due process where predeprivation process is feasible. *Logan v. Zimmerman Brush Company,* 455 U.S. 422, 436 (1982). The record is clear that the City could easily have provided petitioners with notice of the neighborhood approval process, and with the neighbors' determination, *before* forcing petitioners to complete construction. In fact, the City has since changed its procedure, and presently accepts the applications without requiring the applicant to first complete construction. (R. 196a). Under these circumstances, where the deprivation arose as a result of an established City procedure, the post deprivation remedies available to petitioners were wholly inadequate to satisfy due process. *See Logan,* 455 U.S. at 436; *compare Parratt v. Taylor,* 451 U.S. 527, 545 (1981). The process which was ultimately afforded petitioners was not granted at a meaningful time or, for that matter, in a meaningful manner.[5] *See Armstrong v. Manzo,* 380 U.S. 545, 552 (1965).

The Third Circuit's decision to uphold a system of land use regulation so patently repugnant to the due process clause, in disregard of established precedent, merits review by this Court.

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[5] It is difficult to descern how the post deprivation process obtained by petitioners was in any respect "meaningful," as petitioners were never put on notice of the requirements necessary to obtain the licenses, even on appeal.

II.

THE THIRD CIRCUIT'S DECISION THAT A MUNICIPALITY WHICH ACTS ARBITRARILY AND IRRATIONALLY MUST ALSO ACT WITH AN "IMPROPER MOTIVE" BEFORE LIABILITY MAY ATTACH PURSUANT TO SECTION 1983 IS CONTRARY TO DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS.

The Third Circuit held that the City could not be liable for implementing its unwritten, undisclosed neighborhood objection policy unless the jury found that the City had acted with an "improper motive." *Midnight Sessions,* 945 F.2d at 685. Never before has this Court required a civil rights litigant to prove that a municipality acted with an "improper motive" in enforcing a constitutionally infirm policy in order to establish liability under 42 U.S.C. § 1983.

In *Monroe v. Pape,* 365 U.S. 167 (1961), *overruled on other grounds, Monell v. New York City Department of Social Services,* 436 U.S. 458 (1978), this Court held that specific intent need not be proven in order to create liability under § 1983. This Court reasoned that § 1983 should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions. *Monroe,* 365 U.S. at 187.

Until the Third Circuit's decision, the Circuit Courts uniformly applied the rule set forth in *Monroe*. Thus, in *Roberts v. Williams,* 456 F.2d 819, 826 (5th Cir. 1971), *cert. denied,* 404 U.S. 866, the Fifth Circuit specifically held that "improper motive is not a prerequisite to suit under § 1983." *See also Kerr v. Chicago,* 424 F.2d 1134, 1140 (7th Cir. 1970); *Allison v. Wilson,* 434 F.2d 646, 647 (9th Cir. 1970), *cert. denied,* 404 U.S. 863.

In *Monell, supra,* this Court overruled *Monroe* to the extent that it held that a municipality could not be held liable under § 1983. *Monell* held that municipal liability could exist where a municipal policy caused the deprivation of a person's constitutional rights. *Monell,* 436 U.S. at 692. However, *Monell* did not alter the *Monroe* holding that specific intent is not a prerequisite to liability under § 1983.

Since *Monell,* this Court has had numerous opportunities to more fully develop the contours of municipal liability under § 1983. Nonetheless, this Court has never held that a municipality must act with an "improper motive" in adopting a policy or custom which deprives a person of constitutional rights.[6] To the contrary, this Court has made clear that where, as here, the policy or custom is itself unconstitutional and causes the deprivation of constitutional rights, municipal liability attaches. *See Monell,* 436 U.S. at 692; *City of Canton, supra* (rejecting the argument that municipal liability only attaches where the municipal policy in question is itself unconstitutional); *Daniels v. Williams,* 474 U.S. 327, 329 (1986) (§ 1983 "contains no state-of-mind requirement independent of that necessary to state a violation of the underlying constitutional right").

The Third Circuit's decision signals a dangerous, new rule of law in which a municipality can only be held liable if it enforces an unconstitutional policy with an "improper motive". Review of the Third Circuit's decision is necessary to clarify this area of law, and to reaffirm the long standing rule that "improper motive", or specific intent, is not a prerequisite to liability pursuant to § 1983.

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[6] Virtually all of these cases address the issue whether a municipal policy or custom existed which caused the constitutional deprivation. *See Pembaur v. Cincinnati,* 475 U.S. 469, 483-484 (1986) ("municipal liability under § 1983 attaches where . . . a deliberate choice to follow a course of action is made from among various alternative" by city policy makers); *St. Louis v. Praprotnik,* 485 U.S. 112 (1988); *Oklahoma City v. Tuttle,* 471 U.S. 808 (1985); *City of Canton v. Harris,* 489 U.S. 381 (1989) (municipal liability may attach under § 1983 "where the city's failure to train [its police officers] reflects deliberate indifference to the constitutional rights of its inhabitants"). There is no dispute in the case *sub judice* that the neighborhood objection policy was adopted by the City of Philadelphia.

III.

THE THIRD CIRCUIT'S DECISION THAT THE DENIAL OF A LAND USE LICENSE DOES NOT CONSTITUTE A FINAL DECISION FOR EVALUATING SUBSTANTIVE DUE PROCESS CLAIMS EFFECTIVELY ELIMINATES THE RULE THAT A CIVIL RIGHTS LITIGANT NEED NOT EXHAUST ITS ADMINISTRATIVE REMEDIES.

In *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City,* 473 U.S. 172 (1985) this Court held that there must be a final decision made by a government entity which denies a person all reasonable use of the property before a taking claim is ripe for review under the Fifth Amendment. This Court carefully explained the important distinction between this "finality requirement" and the requirement that a litigant exhaust its administrative remedies. The finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate. *Id.* at 193.

This distinction is of the utmost importance because a civil rights litigant is not required to exhaust its administrative remedies before bringing suit. *Patsy v. Florida Board of Regents,* 457 U.S. 496 (1982). Thus, in *Williamson,* this Court specifically ruled that the property owner *would not* be required to appeal a planning commission's rejection of a preliminary property plat to a "Board of Zoning Appeals" because the Board was empowered, at most, to review that rejection, not to participate in the Commission's decisionmaking. *Williamson,* 473 U.S. at 193. However, the property owner's claim was found to be premature because it had not attempted to obtain variances which would have allowed a beneficial use of the property. *Id.* at 194.

The Third Circuit ruled that Down South's substantive due process challenge never ripened for review because "Down South did not appeal to the Review Board the citations for violations it received from [Licenses & Inspections] thereby precluding "final administrative actions" by the City. *Midnight Sessions,* 945 F.2d at 686. This analysis inextricably links and confuses the final decision rule of *Williamson* and the exhaustion of administrative remedies doctrine.

The review procedures referred to by the Third Circuit were clearly remedial in nature — like those of the Board of Zoning Appeals in *Williamson* — and therefore were nothing more than administrative remedies. The Third Circuit thus effectively held that Down South was required to exhaust its administrative remedies before pursuing its substantive due process claim, in direct conflict with rulings of this Court.

Moreover, even though the final decision rule articulated in *Williamson* is, by its very nature, confined to the Fifth Amendment taking claims, the Third Circuit extended the rule to include all substantive due process cases brought pursuant to § 1983. Nothing in *Williamson,* or this Court's decisions after *Williamson,* have imposed this final decision rule outside the context of claims brought under the Fifth Amendment. *See Smithfield Concerned Citizens v. Town of Smithfield,* 907 F.2d 239 (1st Cir. 1990) (landowners not required to satisfy *Williamson* final decision rule in order to bring substantive due process challenge).

Review by this Court is necessary to prevent the evisceration of the rule that administrative remedies need not be exhausted before bringing suit under § 1983, and to prevent the expansion of the final decision rule into all areas of substantive due process.

IV.

THE THIRD CIRCUIT'S DECISION THAT ARBITRARY GOVERNMENT ACTION THAT DEPRIVES A PERSON OF A LEASEHOLD INTEREST IN PROPERTY IS NOT A TAKING FOR WHICH COMPENSATION IS DUE IS NOT IN ACCORDANCE WITH DECISIONS OF THIS COURT.

The Third Circuit held that there could not be a taking of property for which compensation was due because the City's actions did not preclude After Midnight from using its property "as an arcade, restaurant, roller rink, and movie theater." *Midnight Sessions,* 945 F.2d at 677. Relying upon the factors set forth in *Keystone Bituminous Coal Ass'n v. Duncan,* 771 F.2d 707, 715 (3d Cir. 1985), *aff'd,* 480 U.S. 470 (1987), the Third Circuit reasoned that a taking is simply not established upon the showing of the denial of the ability to exploit a property interest believed to be available. *Midnight Sessions,* 945 F.2d at 676.

In reviewing the record on appeal, however, the Third Circuit failed to view the record in a light most favorable to petitioners herein, who prevailed on their taking claim in the district court. The evidence at trial established that After Midnight was built specifically for use as a dance hall, and could not remain economically viable without dancing, despite its best efforts. (R. 153a-154a, 212a-213a). Most importantly, the Third Circuit overlooked the fact that After Midnight was evicted from the premises by its landlord for nonpayment of rent, thereby depriving petitioners of their leasehold interest in the property, and the valuable improvements thereto. (R. 159a-161a, 216a-217a).

This Court has long held that the deprivation of a leasehold interest in property by the government may amount to a taking of property for which compensation is due under the Fifth Amendment. *See Alamo Land & Cattle Co., Inc. v. Arizona*, 424 U.S. 295 (1976); *United States v. Petty Motor Co.*, 327 U.S. 372 (1946); *see also First Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987) (government may be liable for regulatory, temporary taking of property). The Third Circuit not only failed to recognize that petitioners' suffered the complete deprivation of their leasehold interest, in so doing they also failed to recognize that this deprivation is of constitutional proportions.

Review of the Third Circuit's decision is necessary to correct this error of law, and to confirm that a government entity must pay due compensation to a lessee who is deprived of its leasehold interest by virtue of arbitrary and capricious government regulation.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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②

91-1225

Supreme Court, U.S.
FILED
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No.

In The

Supreme Court of the United States

October Term, 1991

MIDNIGHT SESSIONS, LTD. t/a AFTER MIDNIGHT, BAKER OCEAN, INC. t/a DOWN SOUTH, GOOD TIMES CAFE, INC., DONALD R. WELCH, SALLY HUNTER, JACK MANOFF, RICHARD SINGER and CURT E. HEIDINGER,

Petitioners,

vs.

CITY OF PHILADELPHIA,

Respondent.

APPENDIX FOR PETITIONERS

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TABLE OF CONTENTS

Page

APPENDIX

Appendix A — Opinion of the Court of Appeals Filed October 2, 1991 .... 1a

Appendix B — Order of the Court of Appeals Denying Rehearing, Filed October 28, 1991 .... 48a

Appendix C — Memorandum and Order of the District Court Denying Post-Trial Motions, Filed February 11, 1991 .... 50a

Appendix D — Memorandum and Order of the District Court Denying in Part and Granting in Part Motions for Summary Judgment, Filed July 23, 1990 .... 64a

Appendix E — Memorandum and Order of the District Court Awarding Attorney's Fees, Filed January 10, 1991 .... 97a

Appendix F — Pennsylvania's Dance Hall Act, 53 P.S. §§ 4731-4742 .... 124a

Appendix G — Notes of Testimony of Court Proceedings 130a

APPENDIX A — OPINION OF THE COURT OF APPEALS FILED OCTOBER 2, 1991

Filed October 2, 1991

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 91-1055, 91-1109, 91-1140

MIDNIGHT SESSIONS, LTD., t/a AFTER MIDNIGHT; BAKER OCEAN, INC., t/a DOWN SOUTH; GOOD TIMES CAFE, INC.; DONALD R. WELCH; SALLY HUNTER; JACK MANOFF; RICHARD SINGER; and CURT E. HEIDINGER

Appellees-Cross-Appellants

v.

CITY OF PHILADELPHIA; CITY OF PHILADELPHIA POLICE DEPARTMENT; CITY OF PHILADELPHIA DEPARTMENT OF LICENSES & INSPECTIONS; CITY OF PHILADELPHIA BOARD OF LICENSE & INSPECTION REVIEW; ALAN KESSLER, ESQ.; JAMES F. JORDAN, JR.; JAMES P. LYNN; ANTHONY P. RABUTINO; CARL SCHMOLLINGER, LARRY A. THOMAS; JAMES J. TAYOUN; JOHN PLONSKI; HENRY HERLING; ROBERT J. D'AGOSTINO; CLARENCE MOSLEY; CURELEY COLE, ESQ.; JOAN S. BAIZER; CHARLES L. DUNCAN, JR.; WEST POPLAR ACTION COMMITTEE; SOUTH STREET BUSINESS ASSOCIATION

City of Philadelphia,

Appellant

James J. Tayoun,

Cross Appellee

On Appeal and Cross-Appeal from the United States
District Court for the Eastern District of
Pennsylvania
(E.D. Pa. No. 90-CV-132)

Argued July 24, 1991

Before: SLOVITER, *Chief Judge*, GREENBERG, *Circuit Judge*, and McCLURE, *District Judge*.*

(Filed October 2, 1991)

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* The Honorable James F. McClure, Jr., United States District Judge for the Middle District of Pennsylvania, sitting by designation.

OPINION OF THE COURT

GREENBERG, *Circuit Judge*.

In this civil rights action, the City of Philadelphia appeals from an order entered February 11, 1991, denying it a judgment notwithstanding a verdict in favor of the plaintiffs Midnight Sessions (After Midnight), Baker Ocean, Inc. (Down South), and several of their individual investors, who alleged that the City violated their constitutional rights by denying their applications for dance hall licenses. In particular the plaintiffs pleaded causes of action under 42 U.S.C. § 1983 claiming that they had been denied substantive and procedural due process of the law and that their property had been unconstitutionally taken. The plaintiffs also alleged that the City denied them equal protection of the laws, asserting in this regard, among other things, that it engaged in intentional race discrimination because it would not license the dance halls as they were in white neighborhoods, but catered to a young black clientele. In addition, Down South asserted that the City unconstitutionally harassed it by repeatedly citing it for City fire code violations. The plaintiffs also advanced a count for racial discrimination predicated on their clientele under 42 U.S.C. §§ 1981, 1982, 1985 and 1986 and a RICO count.

The verdict was returned on interrogatories and was based on three findings that the City violated the plaintiffs' rights to procedural and substantive due process of law and took their property without just compensation. The City, however, was found not liable for racial discrimination and the RICO count and equal protection counts were dismissed before trial. The jury awarded $2,553,000 to After Midnight and $522,000 to Down South in lump sums without a breakdown on particular bases for liability. The district court by an order entered on January 14, 1991, from which the City also appeals, granted attorneys' fees and costs of $644,460.40 to the plaintiffs. Though, as we later explain, the plaintiffs cross-appealed from a pretrial order granting judgment to an individual defendant, James J. Tayoun, we will refer to the plaintiffs as the appellees as the City is the principal appellant.

On a motion for summary judgment decided before the trial, the district court held that the appellees' loss of investment in the dance halls could be a taking without just compensation but deferred for decision at trial the question whether there had been a taking. Furthermore, the court in a pretrial ruling characterized the due process issue as whether the City's licensing procedure in this instance was arbitrary and capricious, determining that the jury would decide that. We conclude that the district court should have granted the City's motion for summary judgment and motion for judgment notwithstanding the verdict on the takings and procedural due process claims as well as on the substantive due process claim of Down South. Furthermore, we conclude that the district court erred in its disposition of the substantive due process claim of After Midnight as it instructed the jury to decide a legal issue which should have been determined by the court. Accordingly, we will reverse and direct entry of judgment for the City on all issues except for the substantive due process claim of After Midnight which we will remand for a new trial.[1]

I. *FACTS AND PROCEDURE*

A. *After Midnight*

The case is complicated both legally and factually and we therefore describe it at length. In June 1987, Jack Manoff and other investors decided to open a new club, "After Midnight," at property they were leasing at 1004-26 Spring Garden Street, Philadelphia, which was to include an arcade, restaurant, roller skating rink, movie theater, and a dance floor to accommodate as many as 2,780 persons. The investors contemplated that After Midnight would feature live entertainment. They intended to operate the skating rink from 10 a.m. to 10 p.m. and an all-night disco from 10 p.m. to 10 a.m. After Midnight obtained zoning and building permits to convert the Spring Garden Street property into the club. In February 1988, After Midnight applied for a dance hall license, which the City's Department of Licenses and Inspection ("L&I"), following its established though unwritten procedure, refused to accept, returning it with a notation that a certificate of occupancy was required before the application. Ultimately After Midnight completed the construction and passed all inspections so that it received its certificate of occupancy on April 27, 1988. It then reapplied for a dance hall license.

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[1] Subject matter jurisdiction in the district court was predicated on 28 U.S.C. § 1331 and 28 U.S.C. § 1343. This court has appellate jurisdiction pursuant to 28 U.S.C. § 1291. We are exercising plenary review as we are deciding the case through the application of legal precepts.

Appendix A

In January 1988, the commanding officer of the applicable police district, Captain Barcliff, reported to the central police division that community opposition to the new dance club was growing. Area residents and businesses were understandably concerned about the large numbers of juveniles expected to attend the dances (3,000-5,000) and contemplated problems from congestion, vandalism, drinking and drugs, noise, muggings, and general disorder. According to Barcliff, After Midnight planned to operate the club throughout the night on Fridays, Saturdays, and Sundays. He concluded that "[i]t is my opinion that the large crowd that is expected would pose a real problem for the neighborhood and the police." In March 1988, Barcliff again reported to the central police division that the opponents in the neighborhood cited "potential increases in vehicle traffic, noise, disturbances on the street, drugs, etc."

Events unfolded as Barcliff anticipated. Following the opening of After Midnight without its dance hall license on May 13, 1988, its operations caused neighbors to complain that it disrupted the neighborhood with noise, trash, drugs, and alcohol; that large numbers of people were roaming the neighborhood or loitering; that patrons were harassing and frightening neighbors; and that patrons were urinating in the street. L&I cited After Midnight for operating without the dance hall license on May 13, but did not cite it for May 14 and 15 despite its continued operation. On May 20, L&I denied After Midnight's application for a dance hall license, the notice of denial indicating that it had been denied due to "Police Disapproval—Objection of neighbors." The notice also stated that an appeal from the disapproval could be filed with the Board of License Inspection and Review within 30 days. After Midnight did appeal but the Review Board affirmed the denial at a hearing on May 31, 1988. The Review Board indicated that the "neighborhood testimony was unanimous, unwavering, and we are pursuaded by the problems that seem to have arisen since the dance hall began in operation in May." After Midnight then appealed to the Court of Common Pleas but it later withdrew the appeal.

In September 1988, After Midnight requested that the Review Board reconsider its denial, but this request was denied on October 25, 1988, the board noting that After Midnight had appealed from the original denial to the Court of Common Pleas and had not obtained relief. The Review Board therefore regarded the matter as concluded. After Midnight reapplied for a dance hall license on October 31, 1988, but L&I indicated that it could not accept the application for three months.[2] After Midnight then sought and obtained a writ of mandamus from the Court of Common Pleas requiring L&I to accept its application. But L&I denied that application on November 29, 1988, noting police disapproval, and stating that its decision was:

> [b]ased on the opposition of various community groups, business persons and nearby residents (within a two block radius) along with the fact that the anticipated large crowds would pose a

---

[2] This was apparently because of Pa. Stat. Ann. tit. 53, § 4737 (Purdon 1972) which provides that if a license is forfeited or revoked at least three months shall elapse before another license may be granted for the premises.

> problem for the neighborhood and to the police department's ability to deliver protective services to the entire community.

App. at 1987.

After Midnight again appealed to the Review Board which, after a hearing on December 12, 1988, ordered L&I to grant the dance hall license. After Midnight thereafter operated as a dance hall for six months before going out of business.

As we have indicated, in its complaint against the City, After Midnight contended that the City's actions constituted both a taking of its property without just compensation and a violation of its procedural and substantive due process rights, and that the City intentionally discriminated against it on the basis of race because its anticipated clientele was primarily young blacks. It also contended that Councilman James J. Tayoun, who actively opposed its application and was a defendant, had inappropriately and illegally meddled in the process. It alleged that the City was liable under 42 U.S.C. § 1983 for the constitutional violations, 42 U.S.C. §§ 1981, 1982, 1985 and 1986 for the racial violations, and 18 U.S.C. § 1961 *et seq.* for RICO violations. In addition, certain other individuals associated with the City, including members of the L&I board, as well as private persons and organizations, were defendants but they are no longer parties, having been dismissed from the case prior to or at trial, and are not involved in this appeal.

B. *Down South*

In June 1988, some of the same investors purchased a much smaller property at 425-27

South Street, Philadelphia, at which a licensed dance club called "Glitters" had previously operated. They planned to convert this property into an after-hours dance club known as "Down South." Down South opened without a dance hall license and was cited by L&I for this violation. It subsequently applied for a dance hall license on September 19, 1988, but L&I denied the application on October 14, 1988, based on a police department report that recommended disapproval and cited community objections. The police report indicated that neighbors objected to the all-night hours, loud noise, public urination, and trash. On November 10, 1988, Down South appealed this determination to the Review Board, asserting that "community objection" was an insufficient ground for disapproval but it did not pursue this appeal.

After Down South applied for the license, L&I cited it for various fire code violations. In particular, on September 28, 1988, L&I cited it for failure to recharge fire extinguishers and to post conspicuously a sign indicating the maximum occupancy. The notice of violation clearly stated that reinspection would occur within the next 30 days but it also indicated a location at which Down South could obtain the sign. On September 30, 1988, L&I reissued a notice citing the same violations, including the statement "[a]ll operations must cease if these violation [sic] are not corrected in the time specified i.e. immediately." The City denied an application for a certificate of occupancy on October 14, 1988, and Down South did not appeal from this denial. The engineer who examined the facility stated that the plans Down South submitted were unacceptable.

Down South asserted claims similar to those of After Midnight and, in addition to suing the City and Tayoun, it, like After Midnight, sued certain other public officials and private individuals and organizations but all were dismissed either prior to or at trial and thus are not parties to this appeal. Down South also alleged that the inspections were acts of harrassment which put it out of business as it ran out of money.

C. *MOTIONS IN THE DISTRICT COURT*

The City filed pretrial motions to dismiss and for summary judgment which were partially successful as the district court ultimately dismissed the equal protection, RICO and 42 U.S.C. §§ 1985 and 1986 conspiracy claims against it, though it would not dismiss the due process and taking claims. The court determined that the parties agreed that the City maintained a long-standing policy to apply police and neighborhood approval to dance hall licensing, a policy the court considered might support municipal liability under 42 U.S.C. § 1983. The court, however, did not decide whether neighborhood objections are a valid legal basis upon which to deny a dance hall license, instead leaving that question to the jury to answer. It did state that the appellees had property interests in receipt of the dance hall licenses if they satisfied the objective criteria required for dance hall licensing, relying on *Winsett v. McGinnes*, 617 F.2d 996, 1007 (3d Cir. 1980) (in banc), *cert. denied*, 449 U.S. 1093, 101 S.Ct. 891 (1981) and *Second & Ashbourne Associates v. Cheltenham Township*, No. 88-6400 (E.D. Pa. July 28, 1989) (available at 1989 WL 86602). It said that the appellees met the objective rules.

regulations, ordinances and laws for licensing and that L&I ultimately did issue a license to After Midnight.[3] It thus concluded that the right to approval of the licenses was a property interest.

The court noted that substantive due process included the right to be free from arbitrary government action and that arbitrariness turned on whether the government action was rationally related to the furtherance of a legitimate government interest. Again, the court concluded that a jury should resolve the question of whether the requirement of community and police approval for the licensing furthered a valid governmental interest or was simply an arbitrary and irrational supplement to the applicable objective criteria. Turning to the procedural due process claims, the court concluded that the availability of an appeal to the Review Board of L&I's decision did not establish, as a matter of law, that the City's procedure was constitutional as provided or applied and the court therefore denied the City summary judgment on the due process claims. On the unconstitutional taking of property claims, the court determined that the property taken was the appellees' "reasonable, distinct, investment backed expectations" in their dance halls. The appellees alleged that their investments for renovation, based on the expectation that they would obtain licenses when the governmental requirements were met, were lost when the City denied their applications for dance hall licenses. The court rejected the City's argument that the appellees had not lost the beneficial use of their properties.

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[3] The district court indicated that it was "undisputed that the plaintiffs' dance hall" was in compliance with the objective criteria. While the opinion is not clear on this point, this observation must have been limited to After Midnight as Down South was not in such compliance.

The district court dismissed the RICO claims against the City and Tayoun, who also moved for a pretrial dismissal, by order entered July 24, 1990. The appellees do not appeal this dismissal insofar as it involved the City and thus we do not describe these claims against it further.[4] The court held that Tayoun's actions did not constitute "racketeering activity" under the statute and thus the appellees did not adequately plead the RICO count. Appellees cross-appeal from the dismissal as to Tayoun.[5]

As we have noted, the jury returned a verdict against the City on the procedural and substantive due process and taking claims, but found it was not liable for intentional race discrimination. The City then moved for a judgment notwithstanding the verdict, or for a new trial, arguing that there was insufficient evidence to support the jury's verdict that it had denied appellees' due process rights or had unconstitutionally taken their property.[6] The City also contended that the district court erred as a matter of law when it submitted the issues of substantive and procedural due process and unconstitutional taking to the jury.

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[4] They seem not to have opposed the City's motion for dismissal of this claim in the district court.

[5] We will not describe the reasons why the claims against the other defendants were dismissed as they are not parties to this appeal.

[6] Motions for directed verdicts were denied at trial.

Finally, the City challenged the submission of certain damage claims to the jury.

In its opinion denying the motion, the district court insisted that it, not the jury, had decided that the appellees had property rights in the dance hall licenses. Thus, it had charged the jury that the appellees had property rights in the dance hall licenses and, although the City objected to the initial charge on this point, it later agreed to the language of the re-charge and did not object. The district court then concluded that there was sufficient evidence to support the jury's finding that Down South had satisfied all the objective criteria for obtaining a license. The court, without elaboration, rejected the City's contention that determination of whether the City's procedures were constitutionally adequate was a question of law for the court. It stated that there was evidence that the City told the appellees it would not consider community objections but, after the appellees appeared for their hearing without evidence, based its decision on that exact criterion.

Likewise, it concluded that there was evidence that the City closed Down South and rendered it financially unable to pursue the appeals process and that this conduct denied it procedural due process. Additionally, the court concluded that the evidence supported the jury's verdict on unconstitutional taking of property. Finally, the court rejected the City's contention that it had submitted questions of law to the jury. The court explained that many issues of material fact were unresolved and required the jury's consideration. The court insisted that it did not ask the jury to determine the constitutionality of the Dance Hall Act nor interpret that statute; rather, it stated that it instructed the jury to determine whether the City acted arbitrarily and irrationally regardless of whether the City violated the Dance Hall Act. It also concluded that a remittitur would be inappropriate. Thus, the City's post-trial motion was denied in its entirety.

D. *CONTENTIONS ON APPEAL*

The City maintains that the district court erred when it submitted to the jury the question of whether the licensing procedure, including consideration of community objection, violated the appellees' constitutional rights to due process. It argues that its policy of requiring police department approval for licensing and neighborhood involvement is rationally related to a legitimate government goal and the conduct of City officials in requiring such approval was rational. The City also argues that the appellees did not have property rights in the dance hall licenses and that the statutory scheme provides adequate process to challenge the denial of a dance hall license, a conclusion the district court should have reached as a matter of law. Finally, the City contends that it did not subject appellees to a taking of property because the properties had many other uses. The City also raises contentions regarding the damages and attorneys' fees but in view of our disposition they are moot.

The appellees respond that the proper characterization of the jury question was whether in denying the licenses the City violated their rights to substantive due process because it acted arbitrarily and irrationally. They contend that there were fundamental procedural irregularities in the City's procedure. They assert that they had property interests in the dance hall licenses and in the money they had invested to rehabilitate the two buildings. They also argue that the City's unwritten policy of soliciting neighborhood approval violated procedural due process. On their cross-appeal, appellees contend that the district court erred when it dismissed the RICO count against Councilman Tayoun, contending that the district court abused its discretion in not permitting them to amend the complaint to include predicate acts of wire fraud and mail fraud.

II. *DISCUSSION*

A. THE DANCE HALL ACT AND ITS ADMINISTRATION

The Dance Hall Act, Pa. Stat. Ann. tit. 53, §§ 4731-4742 (Purdon 1972), requires dance halls to obtain an annually renewable license. The mayor is charged with the duty of investigating all applications for licenses "to determine whether or not the dance hall ... sought to be licensed, complies with the rules, regulations, ordinances, and laws applicable thereto, and, in making such investigation, he shall, when desired, have the assistance of any department of the government of the city." *Id.* § 4735. The statute continues:

> No license for a public dance hall... shall be issued until it shall be ascertained that the place for which it is issued complies with and conforms to all laws, ordinances, health and fire regulations, applicable thereto, *and is a safe and proper place for the purpose for which it shall be used*, properly ventilated, and supplied with sufficient toilet conveniences.

Id. § 4736 (emphasis added).

The mayor may revoke the license of the dance hall "for disorderly or immoral conduct on the premises" or upon proof that the dance hall is frequented by disorderly or immoral persons, or for any violation of the rules, regulations, ordinances, and laws applicable to dance halls. *Id.* § 4737. Police may inspect dance halls at any reasonable time and may vacate the premises "whenever any provision of any law or ordinance with regard to public dances ... is being violated." *Id.* § 4739.

According to L&I's Chief of License Issuance, L&I had several unwritten policies governing dance hall licenses. In 1988, it would not accept a dance hall license application until the applicant had a certificate of occupancy. L&I referred applications to other City departments for a fire inspection, a tax confirmation, and police department approval. The police department checked to determine whether the operator had a criminal record, performed a survey to determine whether neighborhood opposition existed in the surrounding community, and made a recommendation to L&I whether to grant the dance hall license. According to the Chief of License Issuance, L&I had a 30-year old policy to adopt the recommendation of the police department upon completion of its investigation.

B. TAKING WITHOUT JUST COMPENSATION

The Fifth Amendment, applicable here through the Fourteenth Amendment, provides that "private property [shall not] be taken for public use, without just compensation." It "does not prohibit the taking of private property, but instead places a condition on the exercise of that power." *First English Evangelical Lutheran Church v. County of*

Los Angeles, 482 U.S. 304, 314, 107 S.Ct. 2378, 2385 (1987). It is designed "not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." *Id.* at 315, 107 S.Ct. at 2385-86 (emphasis in original). Furthermore, it does not require that just compensation be paid in advance of or even contemporaneously with the taking. *see Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 194, 105 S.Ct. 3108, 3120 (1985); rather, all that is required is the existence of a "'reasonable, certain and adequate provision for obtaining compensation'" at the time of the taking. *Blanchette v. Connecticut General Insurance Corp.*, 419 U.S. 102, 125, 95 S.Ct. 335, 349 (1974) (quoting *Cherokee Nation v. Southern Kansas R. Co.*, 135 U.S. 641, 659, 10 S.Ct. 965, 971 (1890)). Thus, "if the government has provided an adequate process for obtaining compensation, and if resort to that process 'yield[s] just compensation,' then the property owner 'has no claim against the Government' for a taking." *Williamson County*, 473 U.S. at 194-195, 105 S.Ct. at 3121 (quoting *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1013, 1018 n.21, 104 S.Ct. 2862, 2878, 2881 n.21 (1984)).

We set forth the factors to be considered in determining whether state action constitutes a taking without just compensation in *Keystone Bituminous Coal Ass'n v. Duncan*, 771 F.2d 707, 715 (3d Cir. 1985), *aff'd*, 480 U.S. 470, 107 S.Ct. 1232 (1987). A "taking may more readily be found when the interference with property can be characterized as a physical invasion by government ... than when the interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." 771 F.2d at 712 (quoting *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124, 98 S.Ct. 2646, 2659 (1978)). Physical invasion, however, is not a prerequisite to a taking. *See also Pinewood Estates v. Barnegat Twp. Leveling Board*, 898 F.2d 347, 350-51 (3d Cir. 1990). In instances in which a state "reasonably conclude[s] that the 'health, safety, morals, or general welfare' would be promoted by prohibiting particular contemplated uses of land," a taking requiring compensation occurs only when a regulation that "destroyed or adversely affected recognized real property interests" reaches a certain magnitude. *Keystone*, 771 F.2d at 712-13. In such a circumstance, diminution in the value of the property is only one factor used to determine whether the degree of interference justifies compensation. *Id.* at 713. A second element is the extent that the regulation interferes with "reasonable, distinct, investment-backed expectations." *Id.* (citing *Penn Central*, 438 U.S. at 124, 98 S.Ct. at 2659)).

A taking is *not* established simply upon a showing of "the denial of 'the ability to exploit a property interest that [the plaintiffs] heretofore had believed was available.'" *Keystone*, 771 F.2d at 713 (quoting *Penn Central*, 438 U.S. at 130, 98 S.Ct. at 2662) (denial to use air rights to build office tower leaves other reasonable beneficial uses of site and, therefore, there is insufficient interference with investment-backed expectations)). *See also deBotton v. Marple Township*, 689 F. Supp. 477, 481 (E.D. Pa. 1988) (denial of curative amendment to zoning ordinance to construct mobile home park does not deprive owner of all uses of property because ordinance still permits construction of single family homes). *But see Wheeler v. City of Pleasant Grove*, 664 F.2d 99, 100 (5th Cir. 1981) (confiscatory measure of *revoking* building permit for apartment complex is a taking), *cert. denied*, 456 U.S. 973, 102 S.Ct. 2236 (1982).

Temporary takings that deny the landowner all use of its property also require compensation for the period of the taking, even if the government authority amends, withdraws, or invalidates the regulation or action that caused the taking. *First English*, 482 U.S. at 321, 107 S.Ct. at 2389. Notably, in *First English*, the Court was required by the procedural posture of the case to assume that the ordinance in question denied the landowner all use of its property because the plaintiff had made that allegation and the trial court sustained the defendant's motion to strike. *Id.* The Court expressly limited its holding to the peculiar facts in *First English* and noted it did "not deal with the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like . . . ." *Id.*

We have consistently taken a narrow view of what constitutes a taking of property by regulation. In *Rogin v. Bensalem Township*, 616 F.2d 680, 692 (3d Cir. 1980), *cert. denied*, 450 U.S. 1029, 101 S.Ct. 1737 (1981), we held that a township's amendments to zoning laws, after it approved a developer's building plan for a 557-unit condominium complex, to reduce the allowable units per acre from 12 to four was not a taking because the amendments applied to all landowners within the affected zone and because the value of the affected property was not "reduced drastically." *Id.* We noted that the Supreme Court's precedents on the change in value tolerated a much larger degree of diminution than presented by the plaintiffs, who claimed a loss in value from $3,000,000 to $2,000,000 as a result of the zoning changes. *Id.* Specifically, we discussed the Supreme Court's decision in *Goldblatt v. Hempstead*, 369 U.S. 590, 592-92, 82 S.Ct. 987, 988-89 (1962), in which the Court held that a city ordinance that banned excavations below the water table and which prevented the claimant from continuing its 30-year old sand and gravel business was not a taking because it was a valid exercise of the police power and, although the ordinance deprived the property of its most beneficial use, the lot retained value. *Rogin*, 616 F.2d at 690. In *Rogin* we explained that the Supreme Court would uphold general land use regulations "unless application of the law destroys or severely diminishes the value of the property...*even if the legislation* prohibits 'a beneficial use to which individual parcels had previously been devoted and thus *cause[s] substantial individualized harm.*'" *Id.* (emphasis added).

In *Pace Resources, Inc. v. Shrewsbury Township*, 808 F.2d 1023, 1031 (3d Cir.), *cert. denied*, 482 U.S. 906, 107 S.Ct. 2482 (1987), we held that the township's rezoning of an area from industrial to agricultural, which frustrated the plaintiff's plans to construct an industrial park, was not a taking without just compensation because the property retained a substantial value that established the existence of residual economically feasible uses. *Id.*

We explained that although the claimant had been denied the best use or uses of the 37 acres, it had not been deprived of all economically viable uses of the property. *Id.* (citing *Goldblatt*, 369 U.S. at 592, 82 S.Ct. at 989; *Penn Central*, 438 U.S. at 131, 98 S.Ct. at 2663; *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114 (1926) (75 percent diminution in value); *Hadacheck v. Sebastian*, 239 U.S. 394, 36 S.Ct. 143 (1915) (reduction in value from $800,000 to $60,000)).

We are satisfied that, in light of these precedents, the appellees could not and did not establish that the denial of the dance hall licenses constituted a taking. The licenses were, of course, not themselves taken as they were simply not issued. Furthermore, there is no basis in the record from which it could be concluded that the alleged diminution in the value of the properties deprived appellees of all economically viable uses of them. The denial of the dance hall license to After Midnight did not preclude the use of the Spring Garden Street property as an arcade, restaurant, roller rink, and movie theater. While the alternative uses of Down South's South Street property are not so clear, it is evident that, as we have already described, it was in violation of important fire code sections and did not have a certificate of occupancy for its premises when its dance hall application was denied. In the circumstances, we do not understand how it could have been deprived of its property when denied the dance hall license, as it could not have used the property for a dance hall even if it had the license. It is even more significant that inasmuch as the property was not in conformity with these regulations, the dance hall license could not have been lawfully issued. In any event, if Down South met the safety requirements and obtained a certificate of occupancy it could have used its property for other lawful purposes.

On the motions for summary judgment, the district court focused its analysis on appellees' investment-backed expectations rather than the value of the property, stating:

> Plaintiffs are entitled to a remedy for 'reasonable, distinct, investment backed expectations' which may involve a recognition of the fact that a property can have value arising from partially executed plans for development, that is unique to its owners and not reflected [in] its current market value. One of the two limiting principles based on [*Pace Resources*] is that even where distinct, investment-backed expectations are involved, a taking through an exercise of the police power occurs only when the regulation 'has nearly the same effect as the complete destruction of the property rights of the owner.'

App. at 144-45 (citations omitted).

It distinguished this case from ones in which the plaintiff was denied a building permit because in those cases, unlike this one, the plaintiffs were not required to invest large sums before their expectations were frustrated. *Id.* (citing *Bello v. Walker*, 840 F.2d 1124 (3d Cir.), *cert. denied*, 488 U.S. 851 & 868, 109 S.Ct. 134 & 176 (1988)). This distinction, however, cannot be reconciled with the Supreme Court's holding in *Goldblatt*, for there the plaintiff had been operating its business for 30 years and had obviously invested great sums before its expectations of continued business were frustrated. The district court's artificial distinction allowed it to avoid the two factors we set forth in *Pace Resources* that limit recognition of a property's value arising from partially executed plans for development:

> First, distinct, investment-backed expectations are reasonable *only if they take into account the power of the state to regulate in the public interest.* Second, even where distinct, investment-backed expectations are involved, a taking through an exercise of the police power occurs *only when the regulation 'has nearly the same effect as the complete destruction of [the property] rights' of the owner.*

808 F.2d at 1033 (emphasis added).

Considering these principles, in *Pace Resources* we held that the landowner did not have a reasonable expectation that it would be entitled to use its property in accordance with its original plan in light of "the legitimate interest of municipalities in being able to modify land use planning rules when they perceived the need for change." *Id.* The mere existence of investment-backed expectations, therefore, is not determinative in the inquiry of whether a taking occurred. In fact, the plaintiff in *Pace Resources* presented evidence that it invested $142,000 in road construction, utility improvements, and engineering costs.

We thus conclude that the district court should have granted the City's motion for summary judgment on the issue of a taking of property without just compensation and should later have granted it a judgment notwithstanding the verdict on the issue. Certainly, the appellees were operating in a known area of state regulation in light of the Dance Hall Act. They decided to invest the funds to construct dance halls although the statute clearly stated that a dance hall license was not available until a site conformed with the relevant laws, regulations, and ordinances and was determined to be safe and proper for the purpose. While appellees' expectations of dance hall licenses and profits are investment-backed, they cannot be reasonable in light of the City's explicit power to regulate dance halls. Additionally, the denial of the dance hall licenses did not destroy the value of the properties; rather, at most it eliminated one possible use of them. Appellees, therefore, were *not* denied all economically feasible uses of the properties. *Pace Resources*, 808 F.2d at 1031. We conclude that denial of the dance hall licenses could not have nearly the same effect as the complete destruction of the property rights of the owner. *Id.* at 1033. In the circumstances we will reverse the order of February 11, 1991, on this taking of property point and will remand for entry of judgment for the City.

C. PROCEDURAL DUE PROCESS

For the appellees to recover for the alleged procedural due process violations the City must have infringed a property interest encompassed by the Fourteenth Amendment.[7] For these purposes, however, property interests are defined somewhat differently than they are for taking purposes for here we focus on what the appellees sought from the City, dance hall licenses, rather than the use of property they already had. A property interest subject to protection by the due process clause results from a "legitimate claim of entitlement" created by an independent source such as state law. *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709 (1972). We have held that an entitlement may exist for a benefit sought but not yet obtained if state law limits the exercise of discretion by the state official responsible for conferring the benefit. *Winsett*, 617 F.2d at 1007.

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[7] We are not concerned with a liberty interest here.

The district court concluded on motions for summary judgment that the appellees asserted a property interest in the dance hall licenses, relying on its earlier opinion in *Second & Ashbourne Associates v. Cheltenham Township*, No. 88-6400 (E.D. Pa. July 28, 1989) in which it indicated that a party seeking approval of a development plan who satisfies all the objective criteria for approval is entitled to approval under Pennsylvania common law. But the scheme for approval of the development plan in *Second & Ashbourne* was markedly different from licensing under the Dance Hall Act.

Under the Dance Hall Act, the City is required to investigate whether the facility complies with the rules, regulations, ordinances, and laws applicable to dance halls. Pa. Stat. Ann. tit. 53, § 4735. The Act precludes issuance of a license until it has been ascertained that the facility complies with "all laws, ordinances, health and fire regulations, applicable thereto, *and is a safe and proper place* for the purpose for which it shall be used." *Id.* § 4736 (emphasis added). Accordingly, the plain language of the statute requires consideration of factors other than compliance with laws, regulations, and ordinances and distinguishes this case from *Second & Ashbourne*. The district court's determination that satisfaction of these "objective requirements" sufficed to create a property interest was tantamount to eliminating from the statute the discretionary element of whether it is a safe and proper place. But the "safe and proper" language makes it plain that the City retains discretion to determine the safety and propriety of the operation, whether the term "place" refers to the facility or its location.

We think it evident that the City could conclude that a dance hall would not be at a proper place if it would substantially disrupt a neighborhood, as the Review Board found had happened in the case of After Midnight. This broad discretion precludes a finding that an applicant has a "legitimate claim of entitlement" in a dance hall license for procedural due process purposes and accordingly appellees could not prevail on this claim.[8] Thus, the district court's instruction to the jury that "[p]laintiffs have a property right in approval of their dance license if they have met all of the objective criteria set forth in the city's ordinances, laws or regulations required for approval of such plans" misstated the law. In effect, therefore, this federal court constitutional litigation was used as a substitute for state court proceedings in which a broader scope of review of the administrative actions might be available, a review not dependent upon an applicant's establishing that it had a property interest for Fourteenth Amendment purposes.

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[8] The parties do not cite any Pennsylvania case which defines the scope of the City's authority under the Dance Hall Act and we are not aware of any precedent limiting the discretionary aspects of licensing under the Act. While *Fantastic Plastic, Inc. v. Flaherty*, 26 Pa. Commw. 11, 361 A.2d 489 (1976), does deal with the statute, it is not apposite because it did not address the City's substantive powers under the Act.

Our approach in this matter to determine whether there is a claim of entitlement is not unique. In *Bateson v. Geisse*, 857 F.2d 1300, 1305 (9th Cir. 1988), the municipality and public officials in a dispute with a developer were sued for, among other things, denying the developer procedural due process in denying him approval of a minor plat. The district court ruled for the defendants on this point and the plaintiff appealed. The Court of Appeals affirmed, holding that the plaintiff did not have a protected property interest in the minor plat application because "of the lack of any significant substantive restrictions on the City Council's powers" so that the matter was left to the "unbrided discretion" of the agency. That is essentially the situation here for, in addition to the objective requirement that applicable laws, ordinances and regulations be satisfied, the license could not be issued unless the facility was a "safe and proper place" for the dances.[9] We hold that this vague standard precludes a conclusion that appellees had protected property interests in the license applications for procedural due process purposes.

Analyses similar to that in *Bateson* were undertaken in the following cases: *Littlefield v. City of Afton*, 785 F.2d 596, 601-02 (8th Cir. 1986) (under Minnesota law, applicant entitled to building permit upon compliance with applicable laws and codes because municipality has no discretion to deny it); *Scott v. Greenville County*, 716 F.2d 1409, 1418 (4th Cir. 1983) (builder has protected property interest in building permit merely upon presentation of application and plans showing a use permitted under zoning ordinance under South Carolina law); *Reed v. Village of Shorewood*, 704 F.2d 943, 948-49 (7th Cir. 1983) (undemanding standards for renewal of liquor license create property interest under Illinois law). While different results were reached in these cases than we reach here, that was because the local law was different and justified a claim of entitlement. But we are informed by their method of analysis.

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[9] The appellees in their brief characterize the "safe and proper" language as "nebulous." That, of course, is our point.

Assuming that the appellees had protected property interests in dance hall licenses, they were not denied procedural due process under the dance hall licensing procedure. To establish a cause of action for a violation of procedural due process, a plaintiff in addition to proving that a person acting under color of state law deprived it of a protected property interest, must establish that the state procedure for challenging the deprivation does not satisfy the requirements of procedural due process. *Parratt v. Taylor*, 451 U.S. 527, 537, 101 S.Ct. 1908, 1914 (1981). Due process requires that a deprivation of property "be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542, 105 S.Ct. 1487, 1493 (1985), and the opportunity to be heard must be at a meaningful time and in a meaningful manner. *Armstrong v. Manzo*, 380 U.S. 545, 85 S.Ct. 1187 (1965).

However, when a state "affords a full judicial mechanism with which to challenge the administrative decision to deny an application for a building permit," the state provides adequate due process. *Bello v. Walker*, 840 F.2d at 1128.

In fact, we have rejected claims of procedural due process violation for administrative schemes remarkably similar to that here. In *Rogin*, we upheld Pennsylvania's scheme for challenging zoning ordinances, which provided for a ministerial review of a proposed use by the Zoning Officer, appeal to the Zoning Hearing Board, and appeal of that decision to the Court of Common Pleas. *Rogin*, 616 F.2d at 694-95. The Zoning Hearing Board was required to provide a hearing; to give notice to the public, the zoning officer, and appellant; and to make findings and to render a decision on the merits. At the hearing, parties could present evidence and cross-examine witnesses. The Board could compel appearances and production of documents. As here, the scheme did not set forth specific standards that the Zoning Hearing Board must consider.

Likewise, in *Bello v. Walker*, 840 F.2d at 1128, we rejected a procedural due process challenge to Pennsylvania's scheme governing applications for building permits. The availability of a full judicial mechanism to challenge the administrative decision to deny an application, even an application that was wrongly denied, precluded a determination that the decision was made pursuant to a constitutionally defective procedure. *Id.*

The procedure available to the appellees provides that, upon application, L&I has the power and the duty to "[d]etermine whether the applicant is properly entitled to the license which he seeks." Home Rule Charter § 5-1002(b). If the applicant is refused, L&I "shall . . . notify the applicant in writing of the refusal and the reasons therefor." *Id.* L&I is required to establish the requirements and standards for all licenses unless the charter provides that another department, such as the Department of Public Health, is responsible for that function "because that department has an appreciation and a comprehension of the reasons why a license is required to a degree not possible to be had by [L&I]." *Id.* § 5-1002(c) & annotation 3. "Standards to be met upon inspection are to be determined by the departments primarily responsible for the functions involved because they will be peculiarly competent to appraise and determine what shall constitute conformance with laws and regulations within the sphere of their functions." *Id.* annotation 5. L&I must forward a copy of the application, as well as other pertinent information, to the appropriate department. *Id.* § 5-1003.

The City's Home Rule Charter provides an appeal procedure by which an aggrieved party may obtain review of L&I action. Upon request, L&I must furnish a written statement of the reasons for the action taken. The Review Board must provide a hearing at which both sides may present evidence and must "make findings and render a decision in writing." *Id.* § 5-1005. Its decision is binding on the City's administrative agencies. An aggrieved party may challenge final local agency action in state court. 2 Pa. Cons. Stat. Ann. §§ 751-752 (Purdon Supp. 1991). This scheme satisfies the requirements of procedural due process. *See Bello*, 840 F.2d at 1128.

Appellees nevertheless contend that the licensing scheme violates procedural due process because the City did not provide notice of the risk that the license might be denied before requiring them to spend substantial sums and the procedure does not give notice that neighborhood approval will be considered as grounds for denying the license. Both claims are without merit.

First, the statute clearly states that no dance hall license will be issued until the facility complies with all laws, ordinances, and regulations. Thus, the risk that the license might not be granted until the applicant spends money to bring the facility into line is *clear* from the language of the statute. Furthermore, we cannot understand how appellees could have thought that they had to be given a license simply because they renovated their facilities for, as we have explained, the Dance Hall Act has licensing criteria independent of the condition of the premises. We also point out that both After Midnight and Down South failed to pursue all available remedies, After Midnight by withdrawing its first Common Pleas action and Down South by not pursuing its appeal to the Review Board. But the *procedure* itself was not inadequate.

Second, to support their contention that the failure to give notice of the criteria the City employs to evaluate dance hall license applications, plaintiffs rely on *McCollum v. City of Powder Springs*, 720 F. Supp. 985, 989 (N.D. Ga. 1989), in which the court reasoned that an ordinance that granted unfettered discretion in the local authority to grant wine and beer licenses to facilities within 300 feet of a residence violated due process because it did not provide notice to applicants that the authority would consider "the general welfare of the community." We will not follow *McCollum*. We believe that the City may consider interests in matters inherently part of its police power, such as safety and welfare of the community, without violating procedural due process, particularly in the light of the "safe and proper" requirement for licensing.

The district court denied summary judgment, stating only that the availability of automatic appeal to the Review Board did not establish as a matter of law that the procedure was constitutional, and submitted the following question to the jury:

> If you find that plaintiffs were deprived of the opportunity to be heard in a meaningful manner, *because plaintiffs were not put on notice that they would have to satisfy neighborhood objections*, then you may find that plaintiffs' procedural due process rights were violated.

But a court, not a jury, should decide whether the licensing scheme satisfied procedural due process. Assuming appellees had protected property interests in the dance hall licenses, the jury question would be whether the City violated the prescribed procedure in denying the licenses.

This procedural scheme provided due process. The denials of the license gave the reasons for denial and set forth the right to appeal. Midnight Sessions appealed to the Review Board and Court of Common Pleas, but withdrew the court proceeding and then requested rehearing from the Board. It ultimately received its dance hall license, albeit later than it expected. But delay alone does not create a *procedural* due process violation. *See*

Bello v. Walker, 840 F.2d at 1127-28 (reasonable remedies for rectification of agency error provide adequate due process). While Down South did not pursue its appeal its failure to do so does not mean that it was denied procedural due process. We can hardly excuse a party from perfecting an administrative appeal because of its financial condition and thereby permit a finding that procedural due process has been denied, particularly where, as here, the administrative appeal procedure was so easily invoked and completed.[10]

In sum, we conclude that After Midnight and Down South did not have protected property interests in dance hall licenses and, even if they did, the City's licensing procedure did not violate the requirements of procedural due process. Thus, the City should have been granted summary judgment on the procedural due process claims and its motion for judgment notwithstanding the verdict should have been granted on them. We will therefore reverse the order of February 11, 1991, on this point and will remand for entry of judgment for the City.

D. SUBSTANTIVE DUE PROCESS

The final basis for the jury's verdict was its finding that the City denied the appellees substantive due process of law. The test for determining whether a law comports with substantive due process is whether the law is rationally related to a legitimate government interest. *Rogin v. Bensalem Township*, 616 F.2d at 689.[11] "'[T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.'" *Id.* (quoting *Williamson v. Lee Optical*, 348 U.S. 483, 487-88, 75 S.Ct. 461, 464 (1955)). Determination of whether a legislative scheme is rationally related to a legitimate government interest is a *question of law* for the court to determine. *See Rogin*, 616 F.2d at 689-90. Federal courts, however, will largely defer to legislative judgments rather than substitute their own judgment in cases involving land use policy because they will not "undermine the legitimacy of democratic decisionmaking unless the local legislative judgment is without a plausible rational basis." *Pace Resources*, 808 F.2d at 1035.

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[10] The appeals to the Review Board are filed on very informal documents and are quickly heard. Thus, After Midnight's initial appeal was heard and decided 11 days after L&I denied it the license.

We have recognized that, notwithstanding a constitutionally procedurally adequate scheme, a plaintiff may maintain a claim of substantive due process violation upon allegations that the government deliberately and arbitrarily abused its power. *Bello*, 840 F.2d at 1129. Thus, allegations that the government's actions in a particular case were motivated by bias, bad faith, or improper motive, such as partisan political reasons or personal reasons unrelated to the merits of the plaintiffs' application, may support a finding of substantive due process violation. *Id. See also Pace Resources*, 808 F.2d at 1035 (irrationality not shown where complaint did not allege government actions toward developer unrelated to land use planning). Additionally, the Court of Appeals for the First Circuit has stated that a government's action may violate substantive due process if the plaintiff could show a "fundamental procedural irregularity, racial animus, or the like." *Creative Environments, Inc. v. Estabrook*, 680 F.2d 822, 833 (1st Cir.), *cert. denied*, 459 U.S. 989, 103 S.Ct. 345 (1982). Clearly in disputed factual situations, determinations of the existence of bias, bad faith, improper motive, racial animus, or the existence of partisan political or personal reasons are properly made by the finder of fact. *Bello*, 840 F.2d at 1130; *deBotton v. Marple Township*, 689 F. Supp. at 481.

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[11] The City does not contend that the appellees' lack of property interests for procedural due process purposes bars their substantive due process claims as it seems to assume that they were entitled to substantive due process in the consideration of their applications but urges that they received it. Thus, we do not address that possibility. Rather, we will assume, without deciding that the appellees were entitled to substantive due process in the consideration of their applications.

But we conclude that the district court erroneously asked the jury to resolve a legal rather than a factual question. In its charge to the jury, the district court stated:

> The test of whether the City violated Plaintiffs substantive due process rights is whether the City lacked any rational basis for the denial of the dance license. The exercise of the City's authority needs only to bear a rational relationship to a legitimate government objective. Inadvertent errors, honest mistakes, agency confusion, or even negligence in the performance of official duties do not rise to a violation of

> substantive due process. Thus, the denial must be arbitrary and capricious with no conceivable rational factual basis for there to be any violation of substantive due process. *It is for you, the jury, to determine whether there existed any rational factual basis for the denial of the approvals.* (Emphasis added).

But, whether the challenged scheme is rationally related to a legitimate government interest and whether, in this particular case, the City acted arbitrarily and irrationally because it had an improper motive are distinct questions that the district court obfuscated in this instruction. Certainly, a jury is ill-equipped to determine whether the licensing scheme, by which L&I delegated investigation of the application to the police department, was rationally related to a legitimate government interest inasmuch as such interests are defined by law. Likewise, the "rational relationship" test is a legal standard applied by the court, not a factual determination rendered by a jury. The only question appropriate for jury resolution, therefore, was whether the City denied the applications due to some improper motive such as political motivation or racial animus. Because we are unable to determine from the jury verdict whether it concluded that (1) the City's scheme was not rationally related to a legitimate government interest, or (2) the City's actions in denying the application were improperly motivated,[12] we will reverse the judgment in favor of After Midnight to the extent that it was predicated on a finding of a violation of substantive due process and will remand for a new trial on that issue.

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[12] We note that the jury rejected appellees' contention that the City's actions were the result of intentional race discrimination.

Whether the City's consideration of community objection was appropriate in the first instance is a question of law for the court to determine. The proper analysis should have been (1) a legal determination whether the City could properly rely on police department approval and neighborhood objection in licensing decisions and, therefore, whether its licensing scheme was rationally related to a governmental interest, *Rogin*, 616 F.2d at 689; *Pace*, 808 F.2d at 1035, and (2) a factual determination whether the City acted with improper motive here and, therefore, whether its action in denying the applications was arbitrary and irrational, *Marks v. City of Chesapeake*, 883 F.2d 308, 312 (4th Cir. 1989) (fact finder's only task was to resolve dispute over government's "true motivation" for acting); *Bello*, 840 F.2d at 1130.[13]

To the extent that legal issues are involved we will decide them rather than remanding for that purpose. We conclude that the City's delegation to the police department for its recommendation was rationally related to a legitimate government interest. The police department performs the investigative functions of determining whether the facility is a "safe and proper place for the purpose for which it shall be used" and that department may be considered expert in public safety matters. Even though this delegation of authority by L&I arguably violates the Home Rule Charter which suggests that departments may not delegate license approvals, a violation of state law in itself does not constitute a denial of substantive due process. Certainly, the delegation of the investigatory function to the police department is not arbitrary or irrational and federal courts do not sit in federal question cases to grant remedies for mere violations of state law.[14]

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[13] The appellees contend that the City did not object to the charge. But the issue is not the charge as such. Rather, the City asked the court to decide legal matters and its appeal is thus directed to the failure of the court to make these decisions rather than its directions to the jury for guidance in decisions which were the jury's to make.

The rationality of a municipality's consideration of community sentiment for determining property use issues is less clear. The United States Supreme Court has held that consideration of community sentiment is not rationally related to any legitimate government objective if that sentiment is based on "negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a [land use] proceeding...." *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 448, 105 S.Ct. 3249, 3258-59 (1985). *See also Sullivan v. City of Pittsburgh*, 620 F. Supp. 935, 946 (W.D. Pa. 1985), *aff'd*, 811 F.2d 171 (3d Cir.), *cert. denied*, 484 U.S. 849, 108 S.Ct. 148 (1987); *Marks*, 883 F.2d at 312. Likewise, statutes have been struck down that permit certain land uses only upon approval of nearby property owners as violative of substantive due process if the statute does not provide standards to guide the property owners' decision and they, therefore, could withhold approval for entirely arbitrary reasons. *See Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 121-22, 49 S.Ct. 50, 52 (1928) (zoning ordinance that permitted erection of philanthropic home upon written consent of two-thirds of owners of property within 400 feet of site not justified by state's police power and violates due process where owners' decision not constrained by any legislative standards nor subject to review, though the Court suggested that a different result might have been reached if the proposed use was likely to be a nuisance or annoyance); *Eubank v. City of Richmond*, 226 U.S. 137, 143-44, 33 S.Ct. 76, 77 (1912) (ordinance permitting two-thirds of owners of property on street to petition for building line is unreasonable exercise of police power that violates due process because it inappropriately permits those owners to determine extent and kind of use of another's property without standards governing exercise of this power).

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[14] This principle is demonstrated by *Pace Resources, Inc. v. Shrewsburg Township*, 808 F.2d at 1023, in which a developer obtained relief on state grounds in a state court from a rezoning ordinance but was unsuccessful in its quest for damages in federal court taking and due process litigation. *See also Creative Environments, Inc. v. Estabrook*, 680 F.2d at 833.

Consideration of public sentiment, however, is not a *per se* substantive due process violation. Recently, the Court of Appeals for the Fourth Circuit struck down a West Virginia statute that permitted the Director of the state's Department of Natural Resources to deny a landfill permit if the facility "is significantly adverse to the public sentiment [in] the area" because the statute did not provide any meaningful standard by which the Director could measure adverse sentiment to determine whether opposition was based on impermissible expressions of self-interest, bias, or ignorance or whether it was based on permissible state concerns. *Geo-Tech Reclamation Industries, Inc. v. Hamrick*, 886 F.2d 662, 663, 666 (4th Cir. 1989). Notably, the court did not reject the state's consideration of public sentiment that was based on factors that were permissible state concerns. In addition to the obvious state concerns of the effects of increased traffic, noise, odors, the court recognized that the state had a legitimate interest in the facility's intangible effects such as the possibility of decreased community pride and fractured community spirit. The court concluded that the Director's deference to the unreflective and unreasoned public sentiment that "a dump is still a dump" was not rationally related to the otherwise legitimate public goal of protecting community pride and spirit. *Id.* at 666.

We agree with the Court of Appeals for the Fourth Circuit that the state may consider community sentiment in evaluating applications for licenses if community objection is based on legitimate state interests such as, *inter alia*, traffic, safety, crime, community pride, or noise. A community's feelings need not be ignored when a massive entertainment facility such as After Midnight is thrust into it with the evident potential for disruption. On the other hand a government's determination predicated on the public's negative attitudes or biases, unfounded fears or speculation, prejudice, self-interest, or ignorance is arbitrary and irrational action that the due process clause proscribes.[15] But, again, consideration of the community's viewpoint about the local effects of a proposed change in their neighborhood that has some basis in fact cannot fairly be characterized as arbitrary and capricious government action. We decline to equate the accommodation of legitimate community concerns to a victory of mob rule to be denounced under substantive due process standards.

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[15] We note that *Browning-Ferris Industries v. City of Maryland Heights*, 747 F. Supp. 1340, 1349 (E.D. Mo. 1990), is not inconsistent with our conclusion that consideration of community sentiment is not a *per se* violation of substantive

We recognize that the appellees' contention that consideration of community sentiment is a *per se* violation of substantive due process finds support in *McCollum v. City of Powder Springs*, 720 F. Supp. at 985. In *McCollum*, the district court, relying on a Georgia Supreme Court case, held that granting or denying applications based on public opposition is an unconstitutional due process and equal protection violation. *McCollum*, 720 F. Supp. at 989 (relying on *Bozik v. Cobb County*, 240 Ga. 537, 242 S.E.2d 48 (1978)). But, we believe that the *McCollum* court's holding is not applicable here as there is no indication in that opinion that the public opposition was reflective of the legitimate concerns reflected in this case. Surely, the state's consideration of public sentiment that reflects legitimate state concerns

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due process. In *Browning-Ferris*, the court held that the city's denial of Browning-Ferris's landfill license was arbitrary and capricious because it relied on public sentiment, specifically the clamorous testimony of business owners located adjacent to the facility, that was contrary to the substantial weight of the scientific and technical evidence supporting continued operation of the landfill. *Id.* at 1349. The *Browning-Ferris* court did not discuss the substance of the business owners' complaints and thus did not weigh the validity of these complaints against the technical evidence.

and has adequate factual basis is not *per se* arbitrary and irrational.

The appropriate consideration for the jury, therefore, was whether the police in their recommendation knowingly relied on unsubstantiated or irrational community objections, based on an improper motive, rather than some legitimate concerns such as traffic congestion, road safety, public safety, crime and noise and therefore whether or not the license was denied by the City on an improper basis. The record reflects that a material fact may remain in dispute as to the neighbors' and police department's motivation and thus we cannot say that the City was entitled to a judgment notwithstanding the verdict on the point. But because of the errors we have identified it must be given a new trial and, accordingly, we will reverse the order of February 11, 1991, denying a new trial on this point and will remand the case for a new trial on the substantive due process claim of After Midnight.[16]

Down South's claim that the City arbitrarily and irrationally enforced fire and building regulations to drive it out of business confronts a different obstacle: its substantive due process challenge never ripened for this portion of its claim. In *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. at 200, 105 S.Ct. at 3123, the Supreme Court, employing a substantive due process analysis, held that the respondent's claim that a regulation was an invalid exercise of the police power was premature because it failed to seek variances from certain zoning ordinances and subdivision regulations and, thus, there had not been a final decision on the application of those ordinances and regulation to respondent's property. The Court explained that resolution of the question of whether the regulation had "gone too far" so as to constitute an invalid exercise of police power depended on its effect on the value of respondent's property and investment-backed profit expectations. *Id.* The Court recognized that exhaustion of administrative remedies was not required for a suit to be brought under 42 U.S.C. § 1983, 473 U.S. at 192, 105 S.Ct. at 3119 (citing *Patsy v. Florida Board of Regents*, 457 U.S. 496, 102 S.Ct. 2557 (1982)), but stated:

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[16] We point out that the jury returned a verdict that the City was not liable for racial discrimination. As we do not disturb this finding, the appellees not having cross-appealed on this point, it may have preclusive effect at the retrial but we do not address that point which has not been briefed. We also observe that while we are remanding for a new trial on this issue we are not foreclosing the City from moving for summary judgment on the substantive due process claim of After Midnight. In this regard we observe that the record in the district court was not developed in the light of the principles we are setting forth so that it is possible that upon further development the record may demonstrate that there is no dispute of fact which should now be deemed material.

> The question whether administrative remedies must be exhausted is conceptually distinct, however, from the question whether an administrative action must be final before it is judicially reviewable.

473 U.S. at 192, 105 S.Ct. at 3119.

The Court explained that the exhaustion requirement referred to procedures by which an injured party could seek review *and* obtain a remedy if the administrative decision was unlawful or otherwise inappropriate. *Id.* at 193, 105 S.Ct. at 3120.

Down South did not appeal to the Review Board the citations for violations it received from L&I nor the denial of the certificate of occupancy. This failure to appeal precludes "final administrative action" by the City and, therefore, these claims were premature and should have been dismissed on summary judgment. Federal litigation of this kind is not intended to be a substitute for carefully constructed state procedures.[17]

Furthermore, we do not understand how Down South can possibly have a valid substantive due process claim by reason of the denial of its dance hall license for when the license was denied Down South's premises were not in compliance with the applicable laws, ordinances and fire regulations and could not have been lawfully occupied. Indeed, it would have been improper to grant it the license at the time that L&I acted on the application so the denial of the application was not arbitrary and capricious. Thus, the motion for summary judgment and for judgment notwithstanding the verdict should have been granted to the City on Down South's substantive due process claims. Therefore we will reverse the order of February 11,

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[17] The City does not contend that After Midnight's claims were premature. It does, however, make the related argument that After Midnight waived its substantive due process objections by not pursuing them in the administrative proceedings. We disagree as we are satisfied that even if we assumed that the appellees could in some circumstances be held to have waived this claim here they did not. They did, after all, make two applications to L&I for a license for After Midnight following which they twice appealed to the Review Board and twice filed Common Pleas actions.

1991. on this point and will remand for entry of judgment for the City.

E. RICO and COUNCILMAN TAYOUN

We have carefully considered the complaint on the RICO count against Tayoun and have determined that it did not adequately charge racketeering activity as defined in RICO. In addition, we have concluded that the district court did not abuse its discretion in not permitting its amendment. Accordingly, we will affirm the order of July 24, 1990, dismissing the action as to him.

III. *CONCLUSION*

We decide that the district court erred when it denied the City's motions for summary judgment and judgment notwithstanding the verdict on the issues of taking without just compensation and procedural due process as to all of the appellees. We will therefore reverse the order of February 11, 1991, denying the motion for a judgment notwithstanding the verdict on these issues and will remand for the district court to enter judgment for the City on them. We have also concluded that the City is entitled to judgment in its favor on the claims of Down South for denial of substantive due process and thus we will reverse the order of February 11, 1991, and will remand for entry of judgment in favor of the City on that issue. While we do not conclude that the City was entitled to judgment in its favor on the substantive due process claim of After Midnight, we are satisfied that there must be a new trial on that issue and we will therefore reverse the order of February 11, 1991, to the extent that it denied a new trial on that claim. The new trial will also include the damages issue as we are not certain that it is so distinct and separate from the liability issue that a new trial may be held on the substantive due process contentions without injustice.[18] *See Childers v. Joseph*, 842 F.2d 689, 699 (3d Cir. 1988). In this regard we point out that while there was only a single damage award in favor of After Midnight, there were three bases of liability for it, two of which are now eliminated.[19] In view of our result the order of January 14, 1991, awarding attorneys' fees against the City will be vacated. Finally, we will affirm the order of dismissal of July 24, 1990, in favor of Councilman Tayoun.

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[18] The damage verdict in favor of After Midnight far exceeded its actual losses for expenses and apparently was predicated on lost profits. The City urges that the evidence of lost profits was speculative and we observe that following its licensing After Midnight ultimately went out of business. While we are not ruling on the admissibility of this evidence at this time, we do bring the attention of the district court to the principles set forth in *Advent Systems Ltd. v. Unisys Corp.*, 925 F.2d 671, 680-82 (3d Cir. 1991), which was decided after the trial in this case.

[19] The district court instructed the jury on damages that if it found the City liable on more than one basis but the appellees suffered only the same injury for each wrong that they would have suffered from a single violation, damages should not be greater than those flowing from the single injury. On the other hand, if it found separate injuries from separate violations the appellees were entitled to just compensation for all the injuries. In view of the circumstance that there were three separate bases for liability but lump sum damage awards, we cannot know what damages, if any, the jury found for After Midnight on the substantive due process violation alone.

Appendix A

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B — ORDER OF THE COURT OF APPEALS DENYING REHEARING, FILED OCTOBER 28, 1991

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 91-1055, 91-1109, 91-1140

MIDNIGHT SESSIONS, LTD., t/a AFTER MIDNIGHT; BAKER OCEAN, INC., t/a DOWN SOUTH; GOOD TIMES CAFE, INC.; DONALD R. WELCH; SALLY HUNTER; JACK MANOFF; RICHARD SINGER; and CURT E. HEIDINGER

Appellees-Cross-Appellants

v.

CITY OF PHILADELPHIA; CITY OF PHILADELPHIA POLICE DEPARTMENT; CITY OF PHILADELPHIA DEPARTMENT OF LICENSES & INSPECTIONS; CITY OF PHILADELPHIA BOARD OF LICENSE & INSPECTION REVIEW; ALAN KESSLER, ESQ.; JAMES F. JORDAN, JR.; JAMES P. LYNN; ANTHONY P. RABUTINO; CARL SCHMOLLINGER, LARRY A. THOMAS; JAMES J. TAYOUN; JOHN PLONSKI; HENRY HERLING; ROBERT J. D'AGOSTINO; CLARENCE MOSLEY; CURELEY COLE, ESQ.; JOAN S. BAIZER; CHARLES L. DUNCAN, JR.; WEST POPLAR ACTION COMMITTEE; SOUTH STREET BUSINESS ASSOCIATION

City of Philadelphia,

Appellant

Appendix B

On Appeal and Cross-Appeal from the United States District Court
for the Eastern District of Pennsylvania
(E.D. Pa. No. 90-CV-132)

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, *Chief Judge*, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, and ROTH, *Circuit Judges*, and McCLURE, *District Judge*[*]

The petition for rehearing filed by the appellees-cross-appellants in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

s/ Morton J. Greenberg
Circuit Judge

DATED: October 28, 1991

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[*] Honorable James F. McClure, Jr., United States District Judge for the Middle District of Pennsylvania, sitting by designation.

APPENDIX C — MEMORANDUM AND ORDER OF THE DISTRICT COURT DENYING POST-TRIAL MOTIONS, FILED FEBRUARY 11, 1991

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 90-0132

MIDNIGHT SESSIONS, LTD. t/a AFTER MIDNIGHT, et al.

v.

CITY OF PHILADELPHIA, at al.

MEMORANDUM

Newcomer, J. February 11, 1991

Presently before the Court is the Motion of Defendant City of Philadelphia For The Entry of Judgment Notwithstanding The Verdict, For A New Trial, And To Alter, Amend, Or Remit, The Judgment. For the reasons which follow, the Court shall deny said motion in its entirety.

I. Factual Background

This is a civil rights case involving an alleged conspiracy under color of state law to deprive plaintiffs of their rights in designing and operating two nightclubs through the defendant's improper use of city agencies and the police force. Plaintiffs, Midnight Sessions, Ltd., t/a After Midnight, et al., are a corporate entity which designed and constructed two nightclubs in Philadelphia.

On January 8, 1990, plaintiffs brought this case alleging causes of action pursuant to 42 U.S.C. § 1983, and the fifth and fourteenth amendments, arguing that defendant's conduct resulted in an unconstitutional taking of plaintiffs' property. On August 1, 1990, the jury returned a verdict in favor of plaintiffs finding that defendant had violated plaintiffs' substantive due process rights, and procedural due process rights, and that defendant's conduct resulted in an unconstitutional taking of plaintiff's property. The jury awarded plaintiffs $3,075,000.00 in damages.

II. Neither Judgment Notwithstanding the Verdict Nor a New Trial May be Granted on Plaintiffs' Due Process Claim.

A. Standard.

It is well settled that Judgment Notwithstanding the Verdict must be used cautiously and sparingly and only under very limited circumstances. *Marian Bank v. International Harvester Credit Corporation, et al.*, 550 F. Supp. 456, 460 (E.D. Pa. 1982), *aff'd*, 725 F.2d 669 (3d Cir. 1983). Such a motion is granted sparingly, since it deprives a party of its Constitutional rights to a jury's determination of the facts. *McCarthy v. Silver Bulk Shipping Ltd.*, 487 F. Supp. 1021, 1025 (E.D. Pa. 1980). The standard for granting a motion for judgment notwithstanding the verdict is the same as that for a directed verdict. *E.J. Stewart, Inc. v. Aitken Products, Inc.*, 607 F. Supp. 883, 888 (E.D. Pa. 1985), *aff'd*, 779 F.2d 41 (3d Cir. 1985).

The moving party is entitled to judgment n.o.v. only when the evidence in support of the verdict is insufficient to create an issue of fact to be submitted to the jury. *Marks v. Mobil Oil Corp.*, 562 F. Supp. 759, 764 (E.D. Pa. 1983) *aff'd*, 727 F.2d 1100 (3d Cir. 1984). To grant such a motion, this Court must find as a matter of law that there can be but one reasonable conclusion as to the proper judgment. *E.J. Stewart, supra*, 607 F. Supp. at 888; *Marks v. Mobil Oil Corp., supra*, 562 F. Supp. at 764.

"In considering a motion for judgment n.o.v., the court must 'expose the evidence to the strongest light favorable to the party against whom the motion is made and give him the advantage of every fair and reasonable inference.' " *Danny Kresky Enterprises Corp. v. Magid*, 716 F.2d 206, 209 (3d Cir. 1983) (quoting *Inventive Music, Ltd. v. Cohen*, 617 F.2d 29, 31 (3d Cir. 1980)). In reviewing the evidence, the credibility and weight of the evidence are outside the parameters of the Court's review. *Fireman's Fund Insurance Co. v. Videfreeze Corp.*, 540 F.2d 1171, 1178 (3d Cir. 1976), *cert. denied* 429 U.S. 1053 (1977). Indeed, judgment n.o.v. is particularly inappropriate where the determination of the proper verdict requires an evaluation of the credibility of witnesses. *Marks v. Mobil Oil Corp., supra*, 562 F. Supp. at 764. *See also McCarthy v. Silver Bulk Shipping, Ltd., supra*, 487 F. Supp. at 1025. Conflicting evidence which could reasonably lead to inconsistent conclusions will not justify a judgment n.o.v. *Fireman's Fund v. Videfreeze Corp., supra*, 540 F.2d at 1178. *See also Andrews v. Dravo Corp.*, 288 F. Supp. 142, 146 (W.D. Pa. 1968), *aff'd*, 406 F.2d 785 (3d Cir. 1969). It is the function of the trier of fact alone to evaluate contradictory evidence and to draw inferences therefrom. *Fireman's Fund, supra*, 540 F.2d at 1178. A court is not free to reweigh the evidence and set aside the jury's verdict merely because the jury could have drawn different inferences or conclusions, or because a judge regards another result as more reasonable. *Lovejoy v. Monongahela Connecting Railroad Co.*, 137 F. Supp. 42, 45 (W.D. Pa. 1955).

The decision to grant a new trial rests in the sound discretion of the court whose "duty is essentially to see that there is no miscarriage of justice." *Marian Bank v. International Harvester Credit Corp.*, 550 F. Supp. 456, 463 (E.D. Pa. 1982) (quoting 6 A *Moores' Federal Practice* ¶ 59.08[5] at 59-160). On a motion for new trial, the evidence must be viewed in the light most favorable to the non-moving party. *Russell v. Monongahela Railway Co.*, 159 F. Supp. 650, 655 (W.D. Pa. 1958), *aff'd*, 262 F.2d 349 (3d Cir. 1958).

One element of a fair trial is an impartial trier of fact. According to the Supreme Court, a litigant "is entitled to a fair trial but not a perfect one, for there are no perfect trials." *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 553 (1984). While Federal Rule of Civil Procedure 59 does not enumerate specific grounds for the granting of a new trial, nevertheless, a new trial should only be granted where: (1) the verdict is against the weight of the evidence; (2) there have been substantial errors in the admission of evidence or in the court's instructions to the jury; or (3) counsel has engaged in improper conduct which had a prejudicial effect on the jury. *Stanton v. Tarantino*, 637 F. Supp. 1051, 1078 (E.D. Pa. 1986).

B. Discussion

1. The Court Correctly Decided Issues Relating to Plaintiffs' Property Interest in Their Dance Hall Licenses.

The City contends that the Court, and not the jury, should have determined whether the plaintiffs possessed a Constitutionally protected property interest in their dance hall licenses. As the Plaintiffs note, this argument is peculiar as the Court did make such a determination not once, but twice.

First, in its Memorandum Opinion of July 23, 1990 respecting the parties' Motions for Summary Judgment, the Court specifically held that "the right to approval of a dance hall license clearly creates a property interest." Memorandum Opinion, July 23, 1990, p. 19. Second, in its charge to the jury, the Court read binding instructions, stating that "I instruct you as a matter of law that the plaintiffs have established that they had a property right in the approval of the dance licenses." (N.T. 8/1, p.96).

Significantly, during the opportunity the Court afforded to counsel to object to the charge, the City sought and obtained a recharge on this very issue. When the language of the proposed recharge was proffered to the City, counsel observed "[t]hat's exactly correct" (N.T. 8/1, p. 114) and "[t]hat clarifies it" (N.T. 8/1, p. 115). After the recharge, the Court again asked the City whether it had any objections to same, and the City raised none. (N.T. 8/1, p. 120). The City nevertheless contends now that the recharge given to the jury, after the City's vigorous argument requesting the recharge, was incorrect because it did not direct the jury to find the plaintiffs had a property right. The City's argument is specious and strains credulity. Having prevailed with the Court to recharge the jury, and agreeing that the recharge in and of itself was correct in its statement of the law, but having lost the verdict, the City now seeks to persuade this Court to overturn the jury's verdict by arguing that the issue should never have been put to, or decided by, the jury in the first instance. Defendant is trying to have it both ways. After careful review, the Court finds defendant's argument entirely devoid of merit and shall deny its motions to the extent that they are based on this argument.

2. The Jury was Entitled to Find as Fact that Down South Satisfied all Objective Codes, Ordinances, and Laws Pertaining to its Dance Hall License.

After review, the Court finds that plaintiffs presented more than sufficient facts to enable a reasonable jury to conclude that despite the City's fire code citations, Down South satisfied all objective criteria and had a property right in its dance hall license. For instance, Down South introduced evidence that its predecessor, Glitters, was not cited for the same conditions that existed at Down South (N.T. 7/25, pp. 174-175); Down South was initially permitted to open and operate as a dance club (N.T. 7/24, pp. 204-205), and was only cited when it changed to a rap format, and advertised itself as an establishment "from the people who brought you After Midnight" (N.T. 7/30, p. 176); thereafter, under suspicious circumstances, the City substituted citations which required Down South to close immediately, effectively putting it out of business (N.T. 7/24, pp. 206-208) even though the City termed the supposed violations "minor" in nature. (N.T. 7/25, pp. 190-191).

Under these circumstances, there can be no question but that a reasonable jury could conclude that the City sought to close Down south by whatever means necessary and for illegitimate reasons. Furthermore, regardless of whether plaintiffs had a property right in the approval of Down South's dance hall license, they undeniably had a protected property interest in their investment in Down South itself, with which, according the jury, the City arbitrarily and capriciously interfered. *See, Rogin v. Bensalem Township*, 616 F.2d 680 (3d Cir.), *cert. denied* 450 U.S. 1029 (1981).

3. The City Erroneously Contends That the Jury Made Findings Regarding Plaintiffs' Property Rights.

As discussed above, the Court, and not the jury, determined the existence of plaintiffs' property rights. Therefore, the City's argument that the jury was not entitled to make these findings is misplaced. Moreover, as noted above, whether or not the plaintiffs had a property right in their dance hall licenses does not end the analysis, since plaintiffs had an undeniable property right in the hundreds of thousands of dollars they invested into the dance halls, and their reasonable expectations of profits therefrom.

4. The Court Properly Declined to Determine Procedural Due Process Issues as a Matter of Law.

Defendant's contention that the Court, as a matter of law, should have decided whether the City's procedures were constitutionally adequate in incorrect.

In contending that the evidence was insufficient to make out a procedural due process violation, the City mischaracterizes the testimony on which its argument is based.

Plaintiffs testified that, although they knew that L&I took neighborhood objections into consideration, they were told at a previous hearing, by a prior Board of License & Inspection Review, that the Board would not accept evidence of neighborhood objections. (N.T. 7/24, pp. 11-12, 71, 163-164). In violation of its own Home Rule Charter, the City published no standards or criteria to the contrary. (N.T. 7/25, pp. 135-140, 210-211). Consequently, plaintiffs appeared for their After Midnight Board hearing armed with evidence that they complied with all laws, but without evidence of community support. (N.T. 7/24, pp. 163-164). The Board then proceeded to base its decision in large measure on the evidence of neighborhood sentiment adduced by plaintiffs' opponents.[1] Despite defendant's vigorous attempt to deny the evidence, the Court finds that there was clearly sufficient evidence presented upon which the jury could conclude that the plaintiffs' procedural due process rights were violated.

With respect to Down South, the City argues that Down South knowingly failed to appeal the denial of its dance hall license. Defendant's argument is without merit. The evidence was uncontroverted that the City closed Down South, thereby rendering Down South financially unable to take advantage of the procedural safeguards the City supposedly offered it. (N.T. 7/24, pp. 211-212). Under these circumstances, Down South cannot be deemed to have voluntarily waived any of its rights. Moreover, the City sought no such waiver charge and fully approved of the Court's substantively identical mitigation charge. (N.T. 8/1, p. 102).

5. *Defendant's Motion for Judgment N.O.V. on Plaintiffs' Substantive Due Process Claim Must Be Denied.*

The City's argument that it is entitled to judgment n.o.v. on plaintiff's substantive due process claim is without merit. In determining whether the City's conduct was arbitrary and unreasonable and therefore a deprivation of substantive due process, the plaintiffs presented substantial evidence for the jury's consideration, which the City now has chosen to ignore. After careful review of the evidence presented, the Court finds that there was certainly sufficient evidence presented to the jury from which a reasonable jury could have determined that the plaintiffs' due process rights were indeed violated.

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[1] Defendant City contests the plaintiffs' use of the term "sentiment" and contends that the plaintiffs are engaging in misstatements; the Court finds this semantic dispute unpersuasive.

6. The Court Did Not Submit Matters Concerning Undisputed Facts and Legal Interpretation to the Jury.

The City seemingly contends, incredibly, that the central facts of the lawsuit were undisputed and, in the face of those undisputed facts, the Court improperly left matters of statutory interpretation to the jury. This contention is simply erroneous.

There were, in fact, numerous disputed issues of fact, including whether the plaintiffs knew that the Board of License & Inspection Review would rely upon neighborhood objections; the extent to which the operations of After Midnight adversely impacted an already-troubled neighborhood; why the City waited seven months to give After Midnight the opportunity to present evidence of neighborhood support; why the City claimed that After Midnight caused problems to the neighborhood, but at the same time refused to provide the additional police that would have solved the purported problems (N.T. 7/24, pp. 188-189; N.T. 7/75, pp. 66-67; N.T. 7/26, pp. 230-231).

More significantly however, the Court did not tell the jury to interpret the Dance Hall Act to determine, for example, whether the City was authorized to consider the objections of neighbors. Rather, the Court, over plaintiffs' objection, instructed the jury to determine if the City acted arbitrarily and irrationally whether or not the City violated the Dance Hall Act. Statutory interpretation was not required of the jury.

7. The Evidence Supports the Jury's Verdict Respecting a Taking of Property.

In its Motion for Directed Verdict respecting the taking issue, the City argues only that it sought to pursue legitimate governmental interests, and that After Midnight could have used its property for concerts and live acts.

The City does not question the Court's charge but merely disagrees with the jury's determination of the issue. In so doing, however, the City conveniently neglects the substantial testimony presented that After Midnight and Down South could not attract patrons unless dancing were permitted (N.T. 7/24, pp. 73, 179); that After Midnight was evicted as the result of the City's actions (N.T. 7/30, pp. 178-179); and that the plaintiffs invested huge sums in these facilities, and had legitimate, investment-backed expectations, all of which was lost because of the City's acts (N.T. 7/24, pp. 192-195; N.T. 7/30 pp. 179-182). These facts constitute a classic taking claim. *See Pace Resources v. Shrewsbury Township*, 808 F.2d 1023 (3d Cir.), *cert. denied*, 107 S.Ct. 2482 (1987).

8. There is No Basis for a Judgment Notwithstanding the Verdict Respecting Damages, or a Remittitur.

A reviewing court has a duty under the law to ensure that a damage award conferred under its jurisdiction is rationally based. *Walters v. Mintec/International*, 758 F.2d 73, 80 (3d Cir. 1985). This court has authority to reduce the jury's damage award or award a new trial if the award is "so grossly excessive as to shock the judicial conscience." *David v. Pueblo Supermarket*, 740 F.2d 230, 239 (3d Cir. 1984).

Defendant contends that the jury's award in this case is so totally out of proportion to what might be reasonable as to constitute, essentially, a punitive damage award against the City. Defendant's argument is, generously stated, not credible. It flies in the teeth of the testimony presented by plaintiffs and mischaracterizes the law.

Plaintiffs introduced expert testimony that they had suffered damages approximating $11 million and the jury awarded $3,075,000. As an initial matter, it should be noted that the Court previously ruled upon the precise contentions at issue. The City filed a Motion in Limine seeking to preclude the plaintiffs' proof of lost profits, on precisely the same basis as that asserted presently — the contention that proof of lost profits suffered by a new business is too speculative to admit. On July 23, 1990, the Court denied the City's Motion in Limine, and held that "new businesses are permitted to adduce sufficient evidence to obtain an award for lost profits although such proof is often difficult to obtain and present."

After plaintiffs submitted the testimony in question, and at the close of all of the evidence, the City again moved for a directed verdict, contending that the lost profits issue should not be submitted to the jury. The Court denied the City's Motion for a Directed Verdict, thereby holding that the plaintiffs' evidence was sufficient for jury consideration.

Pennsylvania law furthermore holds that the City, having put the plaintiffs out of business in the first instance cannot be heard to now complain about the supposedly speculative nature of the plaintiffs' lost profits evidence. It was, as plaintiffs have correctly argued, the City's actions which prevented the plaintiffs from establishing a "track record" from which they could project their lost profits with certainty. *Merion Spring Company*, 462 A.2d 686, 698 (1983). *See also, Commonwealth Trust Company of Pittsburgh v. Hachmeister Lind Company*, 320 Pa. 233, 181 A. 287 (1935), wherein the Pennsylvania Supreme Court stated:

> A defendant whose wrongful conduct has rendered difficult the ascertainment of precise damages suffered by the plaintiff, is not entitled to complain that they cannot be measured with the same exactness and precision as would otherwise be possible . . . The risk of the uncertainty should be thrown upon the wrongdoer instead of upon the injured party.

181 A. at 790 (citations omitted). *See also, Restatement (Second) of Contracts*, § 352.

Regarding the evidence, the City's recitation is disingenuous. The City complains of the lack of "facts and data" underlying the assumptions on which Mr. London's lost profit projection was based. In so doing, it mischaracterizes the record. Mr. London, a former banker, provided a factual predicate for plaintiffs' lost profit projections. Before construction commenced, he performed an extensive analysis respecting the financial records of the old After Midnight, which operated a similar, very successful business over a lengthy period of time. Mr. London opined that After Midnight suffered lost profits of $9,056,600, and Down South suffered lost profits of $845,400, over five years. This, in combination with actual, out-of-pocket lost investment in the amount of over $1 million comprised the plaintiffs' damage claim.

The City's expert, Dr. Kush, offered a different expert opinion than did Mr. London but, in accordance with the Court's charge, the jury was free to believe whomever it chose. (N.T. 8/1, pp.

88-89).

Additionally, the City baldly asserts that plaintiffs did not prove that the City, as opposed to outside circumstances, caused their loss. Plaintiffs' evidence on this issue was voluminous and the jury clearly was persuaded by this substantial evidence.

Finally, respecting the City's contentions regarding the plaintiffs' failure to mitigate, the Court finds the City's arguments unpersuasive. After Midnight attempted to get the City to expedite a reconsideration of its position; After Midnight attempted to hold concerts, roller skating and other activities, without dancing, and failed "miserably"; After Midnight even attempted to open illegally and in defiance of the City, permitting dancing without a dance hall license, only to be threatened into financial demise by City officials. As the Court correctly charged without objection from the City, the City had the burden to prove the plaintiffs' supposed failure to mitigate. Nevertheless, the City failed to adduce any evidence in support of this contention. Accordingly, the City's various arguments that the jury verdict, with respect to damages, must be vacated or reduced is without basis in law or fact and must fail.

9. The Court did not Improperly Exclude Witnesses.

After review of the defendant's contention that the Court improperly excluded certain witnesses, the Court finds defendant's argument devoid of any merit and shall deny it essentially for the reasons set forth in plaintiffs' response.

An appropriate Order follows.

Clarence C. Newcomer
Clarence C. Newcomer, J.

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 90-0132

MIDNIGHT SESSIONS, LTD. t/a AFTER MIDNIGHT, al al.

ORDER

AND NOW, this 11th day of February, 1991, after consideration of the Motion of Defendant City of Philadelphia For The Entry of Judgment Notwithstanding The Verdict, For A New Trial, And To Alter, Amend, Or Remit The Judgment, and the plaintiffs' response thereto, and consistent with the foregoing Memorandum Opinion, it is hereby Ordered that said Motion is DENIED.

AND IT IS SO ORDERED.

s/ Clarence C. Newcomer
Clarence C. Newcomer, J.

ENTERED: February 11, 1991
CLERK OF COURT

APPENDIX D—MEMORANDUM AND ORDER OF THE DISTRICT COURT DENYING IN PART AND GRANTING IN PART MOTIONS FOR SUMMMARY JUDGMENT, FILED JULY 23, 1990

IN THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

MIDNIGHT SESSIONS, LTD.,
t/a AFTER MIDNIGHT, et al.

v.

CITY OF PHILADELPHIA, et al.

Civil Action

Filed July 23, 1990

No. 90-0132

MEMORANDUM

Newcomer, J. July 23, 1990.

This is a civil rights case involving alleged deprivations of plaintiffs' constitutional rights due to the defendants' improper use of city agencies and the police force. Plaintiffs, Midnight Sessions, Ltd., t/a After Midnight, et al., are a corporate entity which designed and constructed two nightclubs in Philadelphia. On January 8, 1990, plaintiffs initiated this action alleging causes of action pursuant to 42 U.S.C. § § 1981, 1982, 1983, 1985, 1986 and pursuant to 18 U.S.C. § 1961.

Appendix D

Before the court is governmental Defendants' Motion for Summary Judgment. Also before the court is Plaintiffs' Motion for Partial Summary Judgment Against City of Philadelphia. The governmental defendants include the City of Philadelphia. ("City"), John Plonski, Henry Herling, Clarence Mosley, Curley Cole, Esquire, Robert D'Agostino, James Tayoun, Alan Kessler, Esquire, James Jordon, James Lynn, Anthony Rabutino, Larry Thomas, and Carl Schmollinger. For the reasons which follow, I shall GRANT these motions in part and DENY them in part.

I. Factual Background.

Plaintiffs sought to open two new nightclubs in the City of Philadelphia. The first of these clubs, known as "After Midnight" was to be located in the Spring Garden Section of Philadelphia and was to occupy a dilapidated industrial building. The 27,000 square foot structure required extensive renovation to make space and structural improvements for food, movies, roller skating, concerts and other entertainment. The club conformed with all applicable zoning requirements. The second club, known as "Down South" was to occupy a preexisting dance club on South Street. Both clubs conformed with all applicable zoning requirements.

At the heart of this controversy is a 1919 state statute which requires that all facilities that wish to permit dancing must obtain a "dance hall license" from the governing municipality. 53 P.S. § 4731, *et seq.* Plaintiffs allege that a failure to obtain such a license would prove fatal to the survival of any similarly designed club in the Philadelphia area and that defendants were aware of this fact.

In order to obtain a license, a club in Philadelphia must comply with the rules, regulations, ordinances and laws applicable thereto. This includes all health, safety and fire ordinances. Unlike building permits, the city procedure requires that all developers complete renovations and obtain all other licenses, including a certificate of occupancy, before the City will grant the dance license. In this case plaintiffs were initially denied a license (even subject to compliance) because the established procedure requires that the dance license not be issued until the developer first satisfies all other requirements.

After completing remodeling at a cost of over $1 Million, including the building of a 14,000 square foot dance floor which the City granted plaintiffs a permit to construct, and taking occupancy, plaintiffs applied for the dance license.

The normal process for obtaining a dance license requires a club operator, after completing all other licensing requirements, to apply for the permit at the City of Philadelphia Department of Licenses and Inspections. If the club meets all legal requirements the Board will issue a license. When plaintiffs went to file for their license for the second time, the City again denied their permit.

Plaintiffs allege that the sole reason given for the City's denying the license was on the basis of a "neighborhood objection." Substantively, plaintiffs claim that "neighborhood objection" is not a legal reason for denying a license. Plaintiffs also allege that this objection might have lead defendant City Councilman James Tayoun, in whose district After Midnight was located, to improperly interfere with the normal licensing process. Plaintiffs claim that a group of predominately white neighbors objected to the presence of the club.

However, the governmental defendants maintain that under the Dance Hall Act, the Mayor of Philadelphia is empowered to issue licenses to permit dancing in only those establishments which qualify as "proper" after an investigation. The Mayor may delegate his responsibility to investigate to the City Department of Licenses and Inspections ("L&I"). Furthermore, according to a long-standing procedure employed by L&I, when an application for a dance hall license is received it is forwarded to the Police Department so that the police may investigate. Defendants maintain that the police are in the best operational position, as the unit of government which is most in touch with the needs of public safety, to determine whether the area is an appropriate location for that type of activity. Defendants contend that the denial of the dance hall license based on neighborhood objections and public welfare is a valid and legitimate licensing procedure. Furthermore, defendants maintain that they did not single out the plaintiffs for harassment nor did the defendants deny the license in an arbitrary, irrational or capricious manner.

The City permitted After Midnight to continue its other business operations but repeatedly cited the club for permitting dancing without the requisite dance license. Plaintiffs allege that the City singled them out for harrassment since City authorities routinely ignored other clubs without licenses. Plaintiffs also contend that, in addition to the City issuing citations against their business, the City police department began a "stop and frisk" program of the black clientele outside the club. Defendants allege that the club drew a large crowd, dumped trash, and created noise, traffic, pollution and other disturbances. Concerned about public safety and welfare, both the police and the neighborhood objected to the dance hall. As a consequence of the objection the dance hall license was denied.

After Midnight, unable to persuade the Board to evaluate new evidence that some neighborhood groups supported their project, subsequently withdrew their application and filed a new one. The L&I initially refused to hear plaintiffs' renewed application but ultimately did so when so ordered by a Writ of Mandamus from the Court of Common Pleas. After review, L&I again denied the dance license. Plaintiffs then appealed the L&I's denial to the Board of License and Inspection Review (the "Board"), and the Board, after weighing the conflicting evidence of neighborhood support, ultimately granted the dance license fully eight months after the plaintiffs had originally applied for it. The license contained a provision requiring dancing to end at 1:00 a.m. Plaintiffs allege that the provision made them completely non-competitive and that, consequently, they continued to lose substantial amounts of money.

Plaintiffs further allege that a similar series of events took place regarding their second club named "Down South." In the case of Down South, however, the City repealed an already effective dance license when plaintiffs purchased the club. The City ordered that Down South be closed immediately until it conformed to all fire, safety and building codes. Down South went out of business before plaintiffs were able to pursue their appellate rights before the Board. Plaintiffs allege that defendants' actions, with respect to Down South, were specifically calculated to drive them out of business.

II. Rule 56 Summary Judgment Standard:

A trial court may enter summary judgment if, after review of all evidentiary material in the record, there exists no genuine issue as to any material facts, and the moving party is entitled to judgment as a matter of law. *Lang v. New York Life Insurance Co.*, 721 F.2d 118, 119 (3d Cir. 1983); *Bank of America National*

Trust and Savings Association v. Hotel Rittenhouse Associates, 595 F. Supp. 800, 802 (E.D. Pa 1984). Where no reasonable resolution of the conflicting evidence and inferences therefrom, when viewed in a light most favorable to the nonmoving party, could result in a judgment for the nonmoving party, the moving party is entitled to summary judgment. *Tose v. First Pennsylvania Bank, N.A.*, 648 F.2d 879, 883 (3d Cir.), *cert. denied* 454 U.S. 893 (1981); *Vines v. Howard,* 676 F. Supp. 608, 610 (E.D. Pa. 1987).

The moving party must initially show an absence of a genuine issue concerning any material facts. *Celotex Corp. v. Catrett,* 477 U.S. 317, 324 (1986); *Childers v. Joseph,* 842 F.2d 689, 694 (3d Cir. 1988). The moving party discharges this burden by demonstrating that there is an absence of evidence to support the nonmoving party's case. *Celotex,* 477 U.S. at 325; *Vines,* 676 F. Supp. at 610. Once the moving party satisfied this burden, the burden then shifts to the nonmoving party, who must go beyond his pleadings and designate specific facts by the use of affidavits, depositions, admissions and answers to interrogatories showing that there is a genuine issue for trial. *Celotex,* 477 U.S. at 324. Moreover, Fed. R. Civ. P. 56 mandates that when the nonmoving party bears the burden of proof it must "make a showing sufficient to establish [every] element essential to that party's case." *Equimark Commercial Finance Co. v. C.I.T. Financial Services Corp.*, 812 F.2d 141, 144 (3d Cir. 1987) (quoting *Celotex,* 477 U.S. at 322).

III. Discussion

Defendants have moved for summary judgment on three preliminary grounds and with six specific responses to the counts set forth in plaintiffs' complaint. These motions include:

Appendix D

1. Defendant City of Philadelphia's Motion for Summary Judgment on the grounds that plaintiffs have failed to prove that the City may share liability for any possible harm plaintiffs may have suffered.

2. Defendants Plonski's, Tayoun's, Herlings's, Mosley's, Cole's, D'Agostino's, Kessler's, Jordan's, Lynn's, Rabutino's, Schmolinger's, and Thomas' Motion for Summary Judgment on the grounds that they are immune from suit and liability due to their status as public officials;

3. Defendant Members of the Board of License and Inspection Review's Motion for Summary Judgment on the grounds that they are immune from suit under judicial immunity;

4. Defendants' Motion for Summary Judgment on Count I of plaintiffs' complaint alleging a deprivation of substantive due process in violation of 42 U.S.C. § 1983 and the fourteenth amendment;

5. Defendants' Motion for Summary Judgment on Count II of plaintiffs' complaint alleging a deprivation of equal protection of the law guaranteed under the fourteenth amendment;

6. Defendants' Motion for Summary Judgment on Count III of plaintiffs' complaint alleging intentional discrimination on account of race and conspiracy in violation of 42 U.S.C. § § 1981, 1982, 1985 and 1986;

7. Defendants' Motion for Summary Judgment on Count IV of plaintiffs' complaint alleging a deprivation of procedural due process in violation of 42 U.S.C. § 1983 and the fourteenth amendment;

8. Defendants' Motion for Summary Judgment on Count V of plaintiffs' complaint alleging an unconstitutional taking of property in violation of 42 U.S.C. § 1983, the fifth amendment and the fourteenth amendment; and

9. Defendants' Motion for Summary Judgment on Count VI of plaintiffs' complaint alleging a violation of the Racketeer Influenced and Corrupt Organization Act (RICO), 18 U.S.C. § 1961 *et seq.*

In addition, the plaintiffs have moved for partial summary judgment on the basis that, as a matter of law, the City of Philadelphia violated the plaintiffs' substantive due process rights in connection with its dance hall licensing procedure.

I shall address each of these in seriatim.

A. Municipal Liability

Municipality liability cannot arise from respondeat superior but must arise from unconstitutional conduct which implements or executes a policy statement, ordinance, regulation or decision officially adopted and promulgated by that body's officers. *Monell v. New York City Department of Social Services,* 436 U.S. 658, 690 (1978). Officially adopted policy statements, regulations or decisions may include past customs and usages within the definition of law in § 1983 because of the persistent and widespread discriminatory practices of state officials. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 167-168 (1970).

In the present case, both the plaintiffs and the defendant City of Philadelphia agree that there exists a long-established officially adopted policy to apply police and neighborhood approval as a criteria in issuing dance hall licenses. The defendants maintain that the policy was to protect public safety and welfare and that the use of neighborhood approval was in furtherance of that objective. The central issue here is whether the defendant City's use of the neighborhood approval criteria was unconstitutional. The fact that the City has for decades employed this procedure which the plaintiffs have alleged is unconstitutional and which has been known and endorsed by the highest City officials satisfies the test set forth for establishing municipal liability. *Monell v. New York City Department of Social Services,* 436 U.S. 658 (1978). Accordingly, I shall deny the City's motion for summary judgment on this issue.

B. Qualified Immunity

The City contends that defendants Plonski, Tayoun, Herling, Mosley, Cole, D'Agostino, Kessler, Jordan, Lynn, Rabutino, Schmollinger, and Thomas are immune from suit and liability under qualified immunity due to their status as public officials. In reviewing this contention, it is necessary to separate the Governmental defendants according to the authority and functions they undertook. For purposes of convenience, defendants Plonski, Herling, Mosely, and D'Agostino, members of the Department of Licenses and Inspections, will be referred to as the "L&I defendants". Defendants Kessler, Jordan, Lynn, Rabutino, Schmollinger, and Thomas, members of the Board of License and Inspection Review, will be referred to as the "Board defendants".

L&I's job is to ensure that applicants for licenses comply with all laws, codes, and ordinances, and if they do, it issues a license. In dance hall license cases, L&I does this by having other City departments verify the applicant's compliance with codes and ordinances. If any license applicant meets the licencing criteria, the L&I defendants must issue the license. They execute primarily ministerial functions. Similarly, the Board defendants do not have the discretion to affirm L&I's denial of a dance hall license if the applicant meets all objective criteria. Home Rule Charter, § 5-1001 *et seq.*

Qualified immunity protects public officials performing discretionary functions only, not ministerial or administrative functions. *Second & Ashbourne Associates v. Cheltenham Township,* 1989 U.S. Dist. Lexis 8823 (1989); *see also Epstein v. Township of Whitehall,* 693 F. Supp. 309 (E.D. Pa. 1988). Furthermore, even government officials who enjoy qualified immunity because they were performing discretionary functions are entitled to such immunity only if their conduct does not violate clearly established constitutional or statutory rights of which a reasonable person would have known. *Hynson v. City of Chester,* 827 F.2d 932, 934 (3d Cir. 1987). The court finds that there are genuine issues of material fact regarding whether the governmental defendants were exercising functions that involved discretionary authority or were merely exercising functions that were ministerial and administrative in nature.

The city also proffers the argument that the individual defendants cannot be held liable for enforcing a statute, the Dance Hall Act, not yet held unconstitutional. However, the City predicates its argument in this regard on an incorrect premise. The plaintiffs here make their claim on account of the individual defendants' alleged failure to enforce the statute; if the individual defendants had applied the stated, objective criteria of the statute, the plaintiffs maintain that the dance license would have issued as soon as the plaintiffs satisfied all of the City's codes and ordinances. In accordance with the foregoing, the court must, and shall, deny the defendants' motion for summary judgment as to qualified immunity.

1. Defendant Herling

Defendant Henry Herling provided evidence that he merely wrote an informative letter to Councilman Tayoun and took no affirmative or significant part in the decision to deny the dance hall license. Plaintiffs have offered no evidence regarding defendant Herling's involvement in this matter. Furthermore, plaintiffs' brief concedes that defendant Herling left the department of L&I on January 8, 1988 and that "plaintiffs no longer make a claim against him." Accordingly, I shall grant Defendant Herling's Motion for Summary Judgment and dismiss him from this action.

2. Defendant Plonski

Defendant Plonski argues that he is entitled to summary judgment because he took no significant role in the events affecting the plaintiffs. However, official policy may be inferred from informal acts or omissions of supervisory municipal officials. *Colburn v. Upper Darby Township,* 838 F.2d 663, 671 (3rd Cir. 1988) (quoting *Estate of Bailey by Oare v. County of York,* 768 F.2d at 506). Mr. Plonski was the Commissioner of L&I during the time that both After Midnight and Down South had their licenses denied. He admits that he had his deputy keep him advised on a regular basis. (Deposition of John Plonski, page 11) (Plaintiffs' Answer, page 12). Furthermore, Plonski knew there were no standards governing the police as they decided who was and was not favored with a dance hall license. The court finds that there is sufficient evidence demonstrating that defendant Plonski may have been involved in this matter to present an issue of fact regarding his role and shall deny his motion for summary judgment.

3. Defendant Cole

Plaintiffs have provided evidence that defendant Cole urged the board to deny the licence based on neighborhood objections. Moreover, evidence exists as to Cole's knowledge that the motivations of the objecting neighbors were racially based and that the city supported the neighbors. Accordingly, the court shall deny defendant Cole's motion for summary judgment.

4. Defendant Councilman Tayoun

In *Harlow v. Fitzgerald,* the Supreme Court enunciated the standard to be applied in qualified immunity cases. The Court held that an official's entitlement to qualified immunity "focuses on the objective legal reasonableness of an official's acts." *Harlow,* 457 U.S. 800, 819 (1982).

Plaintiffs have provided deposition testimony that Councilman Tayoun may have been motivated by racism and improperly interfered with the dance hall license for Down South. In addition, the plaintiffs advance a host of factual allegationss against Councilman Tayoun which they have been able to prove. Initially, the plaintiffs state that Mr. Tayoun "promised his supporters that After Midnight would not receive its dance hall license." (Complaint at p. 32, ¶ 74(c)). Councilman Tayoun acknowledged in his deposition that someone from his office probably wrote such a promise on the bottom on a copy of an informational letter he received from Mr. Herling and distributed to his constituents.

The plaintiffs also claim the fact that Councilman Tayoun "intervened" and "exerted political pressure and influence on various persons and entities . . . for the purpose of seeking to delay and/or effectuating the denial of After Midnight's dance hall license in a fashion contrary to law and usual procedures."

Although the plaintiffs present some testimony that persons who used Councilman Tayoun's name collected a campaign contribution from the owners of Glitters, the predecessor club to Down South before that club received a license, the plaintiffs present no evidence to connect Councilman Tayoun with any guestionable conduct that may have occurred in the cases of After Midnight or Down South. The court finds that a review of Councilman Tayoun's acts as alleged by the plaintiffs, and the evidence put forward, fails to rise to the level that it creates a genuine issue of material fact sufficient to defeat defendants' motion for summary judgment as to Councilman Tayoun. Accordingly, the court shall grant said motion and dismiss Councilman Tayoun from this action.

C. Judicial Immunity

The City argues that summary judgment should be entered as to the members of the Board of License and Inspection Review for two reasons. First, the City contends that, since there is "no proof the board members took money, made secret deals, or departed from their customary procedure", summary judgment should be granted in their favor. The City also argues that the board members are judicially immune from suit. The court finds these arguments to be without merit.

First, the plaintiffs are correct in their assertion that they do not need to prove that the board members took money, made secret deals, or departed from their customary procedure in order to establish their substantive due process claims. The board initially denied plaintiffs' application for a dance license on the grounds of neighborhood objection; the court has already determined that whether neighborhood objection is a valid legal basis upon which to deny a dance license is an issue to be resolved by the finder of fact. The use by the board of such a criteria may be found by the trier of fact to have been arbitrary and capricious and violative of plaintiffs' substantive due process rights. The mere fact that this was the board's customary procedure does not automatically relieve the board members of liability. Rather, as plaintiffs have correctly argued, it serves to highlight the City's potential liability.

Secondly, the City argues that the board members are absolutely immune from liability because they were at all times acting as "judicial officers". As the city has observed, however, and as this court previously held in ruling on defendants' Motion to Dismiss, absolute immunity does not attach to the board members as long as "plaintiffs can prove their claim that the individual Board members were acting in an administrative capacity rather than a judicial capacity."

If the board members were acting as administrators they cannot claim legislative or judicial immunity. *Epstein v. Township of Whitehall*, 693 F.Supp. 309, 315 (E.D. Pa. 1988). Thus, it is necessary to examine how the board operates.

In the instant case, the board members claim that they are a judicial-like entity which play not an administrative role but a judicial role. The board members rely on the Home Rule Charter claiming that the Board is established as:

> an agency created for the purpose of affording citizens adversely affected by the exercise of licensing and inspection powers, vested in City agencies, an orderly procedure, in conformity with *due process*, for the review of action taken against them. Decisions of the Board are to be binding upon the administrative agency of the City involved, subject, of course, to such further right of appeal to the Courts may exist. [emphasis added].

Comment to Section 5-1005.

At first blush, this Comment suggests the creation of a judicial-like body. In determining whether judicial immunity is to be applied, however, the courts have made clear that mere labels do not afford an individual judicial immunity. Just because an individual is called a judge, does not mean that that person is judicially immune from suit. In *Forrester v. White,* 484 U.S. 219, 108 S.Ct. 538, 544 (1988), for instance, the Court observed that judicial immunity is "justified and defined by the functions it protects and serves, not by the person to whom it attaches."

The plaintiff point out that the defendant City recognizes that the board "has no set policy, no standard which it applies in its factual determinations of dance hall license appeals." (City's Brief, at 27). Nor is it "bound by the City's established procedures." (City's Brief, at 27). However, "the board is impressed when neighbors take time out of their schedules to attend the hearing and show proof of their opposition to a dance hall license." (City's Brief, at 27).

As plaintiffs correctly argue, in order for acts to qualify as judicial those acts must be "intimately related to the judicial process." *Walters v. Wolfe*, 602 F. Supp. 853 (E.D. Pa. 1985). Those individuals who are "intimately related to the judicial process" — and who are entitied to immunity — reach decisions by applying law to fact and utilizing established procedures. The court finds that there remains genuine issues of fact regarding whether the board members are entitled to judicial immunity. Accordingly, the defendant members of the Board of Licenses and Inspection's Motion for Summary Judgment on the basis of judicial immunity shall be denied.

D. Count I of Plaintiffs' Complaint alleging Substantive Due Process:

Defendants' motion for summary judgment on Count I of plaintiff's complaint alleging a deprivation of substantive due process in violation of 42 U.S.C. § 1983 and the fourteenth amendment shall be denied.

1. Property Interest.

The fourteenth amendment provides, in part, that no "State [shall] deprive any person of life, liberty, or property, without the due process of the law . . ." U.S. Const. amend XIV, § 1. Thus, as a threshold issue, plaintiff must have a protected liberty or property interest, to bring a § 1983 claim based upon deprivation of due process. *Stana v. School District of City of Pittsburgh*, 775 F.2d 122, 125 (3d Cir. 1985). The Third Circuit has held that an entitlement may exist with respect to a benefit which is sought but not yet obtained, whenever state law limits the exercise of discretion by the state official responsible for conferring the benefit. *Winsett v. McGinnes*, 617 F.2d 996 (3d. Cir. 1980), *cert. denied* 449 U.S. 1093 (1981). This court specifically recognized that a party seeking approval of a development plan, which satisfies all of the objective criteria for approval of such a plan, is *entitled* to approval of those plans. *Second & Ashbourne, supra*. Furthermore, this court held that property interests are clearly created in approval of a development plans.

Similarly, in the instant case, if the plaintiffs seeking approval of a dance hall license satisfy all of the objective criteria for approval of such a plan, those plaintiffs are entitled to approval of their plans and such approval unguestionably creates property interests. Plaintiffs specifically alleged that the dance hall complied with all the objective regulations and that neighborhood approval is not a valid licensing criterion. Defendants however, maintain that neighborhood approval, although not the sole criterion, is an important one established under the state laws. It is undisputed that the plaintiffs' dance hall complied with the objective rules, regulations, ordinances and laws applicable under the state law including all health, safety and fire ordinances. Furthermore, the L&I Board, after weighing the conflicting evidence of neighborhood support, ultimately granted the dance hall license. The court finds that the right to approval of a dance hall license clearly creates a property interest.

2. Arbitrary and Capricious Conduct

It is clear that an essential aspect of due process is the right to be "free from [the] arbitrary exercise of powers of government." *Daniels v. Williams*, 474 U.S. 327, 331 (1986). The test for determining whether the governmental action is "arbitrary" is whether the action in guestion is rationally related to the furtherance of a legitimate governmental interest. *Rogin v. Bensalem Township*, 616 F.2d 680, *cert. denied* 450 U.S. 1029 (1981).

This court noted in *Second & Ashbourne* that the due process standard does not require that every action taken by the governmental unit be legally correct. Even if the decision to deny the development plans was inconsistent with Pennsylvania law, it does not necessarily follow that the action was arbitrary and capricious. For example, a negligent deprivation of life, liberty or property would not implicate the due process clause. *Daniels,* 474 U.S. at 331. Plaintiffs need to prove that there was a deliberate and arbitrary abuse of governmental power.

In the instant case, defendants attempted to provide legitimate governmental reasons for denying the dance hall license. Defendants argue that police and neighborhood approvals are important and legitimate licensing criteria and that they in no way abused their privileges of government power. Plaintiffs argue in rebuttal that there is no stated reguirement for neighborhood approval for issuance of dance hall license and that the government arbitrarily and irrationally applied such criteria. It appears clear, from the evidence provided by both parties, that reasonable minds could differ as to whether the defendants' actions were irrational and capricious. The issue is best left to the factfinder at trial.

Based on foregoing, I shall deny defendants' Motion for Summary Judgment on plaintiffs' substantive due process claim.

E. Count II of Plaintiffs' Complaint alleging denial of Equal Protection:

The test for analyzing the Equal Protection Clause is well established and requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class. *San Antonio School District v. Rodriguez,* 411 U.S. 1, 28 (1973). Otherwise, the applicable standard is to determine whether the classification bears some rational relationship to a legitimate state purpose. *Id.* at 28. The activity of dance hall patrons, coming together to engage in recreational dancing, is not protected by the first amendment and the hours of operation of dance halls is subject to the rational basis test, "the most relaxed and tolerant form of judicial scrutiny under the Equal Protection Clause." *Dallas v. Stanglin,* 490 U.S. ____ , 104 L.Ed.2d 18 (1989).

Under the rational basis standard, legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest; such legislation will not be overturned unless it is so unrelated to the achievement of any combination of legitimate purposes that the court can only conclude the legislature's acts were irrational. *Anderson v. City of Philadelphia,* 845 F.2d 1216, 1222-1223 (3d Cir. 1988). Defendants maintain that by imposing certain licensing requirements and prerequisites in dance halls, the legislature and the city defendants are attempting to promote the welfare of the public. However, plaintiffs argue that they were denied equal protection under the law because imposing strict regulations solely on dance halls and not on other establishments which draw large crowds is irrational and arbitrary.

The defendants provided evidence that the individual defendants treated the plaintiffs' clubs in a manner no different from the way they treated other similarly situated clubs. Defendants provided testimony that other dance halls have been subjected to the same kind of inspections, cease and desist orders and enforcement of the Dance Hall Act as was After Midnight. In addition, plaintiffs do not dispute that there have been other dance halls which have been denied dance hall licenses based upon neighborhood objection at the L&I level. Plaintiffs merely provide evidence that their clubs were treated differently from other establishments which draw large crowds.

Defendants, the moving party, demonstrated by affidavits and depositions that there is an absence of evidence to support plaintiffs' claim. The burden now shifts to the plaintiffs to demonstrate beyond pleadings that they were denied equal protection. Plaintiffs must provide evidence showing different treatment by the defendants concerning other similarly situated dance halls and that such treatment fails the rational basis test. However, plaintiffs offer no evidence that After Midnight and Down South were treated differently from other dance hall clubs and the court rejects the plaintiffs' contention that the comparison should be made to other establishments that draw large crowds rather than just other dance hall clubs.

In the instant case, it is insufficient to argue that there exists an irrational and arbitrary distinction between dance hall clubs and other establishments which draw large crowds. Rather, the plaintiffs must demonstrate that there has been an irrational distinction between their club After Midnight and other similarly situated dance halls. The city need not provide the same licensing procedures for dance halls and every other establishment that draws large crowds as there are different considerations that may enter into play. However, under the rational basis standard, the city is reguired to provide the same licensing procedures for all other dance halls similarly situated to After Midnight and Down South. The court finds that plaintiffs have failed to carry out their burden of proving that they were denied equal protection.

In accordance with the foregoing, I shall grant defendants' Motion for Summary Judgment on plaintiffs' Equal Protection claim.

F. Count III of Plaintiffs' Complaint alleging Intentional Racial Discrimination.

1. Intentional Discrimination on account of Race

Defendants' motion, for summary judgment on Count III of plaintiffs' complaint alleging intentional discrimination on account of race in violation of 42 U.S.C. § 1981 shall be denied.

In order to sue in federal court a plaintiff must allege a "distinct and palpable injury" and must assert his own legal rights and interests; a plaintiff cannot predicate his claim to relief on the legal rights or interests of third parties. *Warth v. Seldin,* 422 U.S. 490, 501 (1975). In the instant case, defendants contend that the plaintiffs are corporations owned by white persons. Plaintiffs' complaint charges the defendants with intentional race discrimination. Defendants argue that, to the extent that plaintiffs are seeking to assert the rights of unidentified third parties, plaintiffs' claims of race discrimination are barred by the doctrine of standing, as the plaintiffs, white persons, have no standing to bring claims based upon alleged racial discrimination against blacks.

However, in order to effectuate the public policy embodied in § 1981, and in order to protect the legal rights of non-whites expressly created by § 1981, a person has an implied right of action against any other person who, with a racially discriminatory intent, interferes with his right to make contracts with non-whites. Moreover, that person has an implied right of action against any other person who, with a racially discriminatory intent, injures him because he made contracts with non-whites. *Riccobono v. Whitpain Township,* 497 F.Supp. 1364, 1369-1370. (E.D. Pa. 1980). The court finds that plaintiffs do have standing to argue their case in this court.

In order to prove a claim of intentional race discrimination under § 1981, plaintiffs claiming their right to be free of race discrimination must prove that the defendants engaged in "purposeful and intentional" discrimination. *Batson v. Kentucky,* 476 U.S. 79, 93 (1986). To survive summary judgment the plaintiff must "point to any portion of her deposition testimony (or other evidence) to support her claim of intentional racial discrimination . . ." rather than make a "general allegation" that what the court reads in a deposition will support her theory. *Sandra Taylor v. Pathmark Supermarkets General Corporation et al.,* C.A. 85-4253 (Slip Opinion January 10, 1986, Newcomer, J.).

In the instant case, plaintiffs have alleged that After Midnight was denied its dance hall license solely because the defendants were motivated by racial fears. Plaintiffs have supported their allegations of racial discrimination with depositions that are sufficient to raise an issue of fact as to whether the City denied the dance hall license based on its fear that the dance hall would bring blacks into the neighborhood. Plaintiffs' allegations are not unsupported or generalized but are sufficient to make out a *prima facie* case under § 1981.

Accordingly, the court shall deny defendants' motion for summary judgment on this count of plaintiffs' Complaint.

2. *Intentional Discrimination on Account of Conspiracy*

Defendants' motion for summary judgment on Count III of plaintiffs' Complaint alleging intentional discrimination on account of conspiracy in violation of 42 U.S.C. § 1985 shall be granted.

Section 1985 provides a private civil remedy for persons injured by conspiracies to deprive them of their right to equal protection under the laws. *Canlis v. San Joaquin Sherriff's Posse Comitatus,* 641 F.2d 711, 718 (9th Cir.) *cert. denied,* 454 U.S. 967 (1981). To establish a § 1985 violation plaintiff must allege and prove four elements: (1) a conspiracy (2) for the purpose of depriving, either directly or indirectly, any person or class of persons the equal protection of the laws, or of equal privileges and immunities under the laws (3) an act in furtherance of the conspiracy (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States. *United Brotherhood of Carpenters & Joiners of America v. Scott, et al.,* 463 U.S. 825, 828-829 (1983). Furthermore, for the purposes of § 1985, discriminatory intention must also be clearly shown *Wagner v. Harmer Township,* 651 F. Supp. 1286, 1288 (W.D. Pa., *aff'd* 826 F.2d 1058 (3d Cir. 1987)).

Plaintiffs argue that the defendants' actions were racially motivated and that this is precisely the type of conspiratorial discrimination which § 1985 was aimed at preventing. However, although plaintiffs have provided testimony which support their racial discrimination argument, plaintiffs nevertheless have failed to carry out their burden of proving that the defendants were acting in a conspiracy. Plaintiffs have failed to provide sufficient evidence for their race based conspiracy claim to create a genuine issue of material fact. Accordingly, the court shall grant defendants' Motion for Summary Judgment as to plaintiffs' race-based conspiracy claim. The court shall also grant defendants' Motion for Summary Judgment on plaintiffs' conspiracy claim under § 1986 for the same reason. Plaintiffs failed to provide evidence as to defendants "having any knowledge [of] any of the wrongs conspired to be done . . ." which is one of the essential elements of § 1986.

G. Count IV of Plaintiffs Complaint alleginq violations of Procedural Due Process:

Defendants' Motion for Summary Judgment on Count IV of plaintiffs' Complaint alleging deprivation of procedural due process in violation of 42 U.S.C. § 1983 and the fourteenth amendment shall be denied.

Notice and opportunity to be heard are the essential elements of the right to procedural due process. *Wisconsin v. Constantineau,* 400 U.S. 433 (1971). The court in *McCollum v. City of Powder Springs,* 720 F. Supp. 985 (N.D. Ga. 1989) did not hesitate in finding the law unconstitutional on the grounds that it did not give the applicant notice that the general welfare of the community would be considered as a ground for denying the license. Furthermore, in that case, the law provided neither guidance nor notice that the general welfare of the community would be considered as a ground for denying the license as to when the Mayor or Council could exercise discretion to grant such licenses, in violation of the due process clause of the fourteenth amendment. *Id.* at 989. Procedural due process requires more than a mere opportunity to be heard; it requires that the "opportunity must be at a meaningful time and in a meaningful manner." *Armstrong v. Manzo* 380 U.S. 545 (1965).

In the instant case plaintiffs allege that the procedure regulating the issuance of a dance hall license is unconstitutional as it does not give the applicant notice that the general welfare of the community or neighborhood approval would be considered as a grounds for denying the license. Furthermore, plaintiffs contend that they were denied procedural due process because the City failed to afford the plaintiffs notice of the risk that the license might be denied before requiring the plaintiffs to expend money and property to renovate the intended dance hall.

Defendants' only argument in support of its motion for summary judgment on plaintiffs' procedural due process claim is that the License and Inspection Review Board provided plaintiffs with an automatic appeal procedure and that the plaintiffs failed to take advantage this available procedure. However, the fact that the L&I Review Board has an automatic appeal procedure does not establish as a matter of law that plaintiffs may not challenge the sufficiency or the application of this process as unconstitutional. *Labov v. Lalley*, 809 F.2d 220 (3d Cir. 1987). Accordingly, the court shall deny defendants' Motion for Summary Judgment on this count.

H. *Count V: Unconstitutional Taking of Property:*

Plaintiffs here do not seek compensation for the "temporary taking" of their property, as asserted by the defendant City in its brief. Moreover, this is not a case where the plaintiffs were denied a permit for one use, but retained the right to use their property for other uses. To the contrary, plaintiffs had a leasehold interest in After Midnight and an investment in hundreds of thousands of dollars of improvements made to the structure. Plaintiffs contend that all of their investment and property was lost by virtue of the City's actions. The plaintiffs maintain that the same phenomenon occurred with respect to their investment in the Down South property. Consequently, plaintiffs seek damages and compensation for their legitimate investment backed expectations as specifically permitted by law.

Plaintiffs are entitled to a remedy for "reasonable, distinct, investment backed expectations" which may involve a recognition of the fact that a property can have value arising from partially executed plans for development, that is unique to its owners and not reflected it its current market value. *Pace Resources, Inc. v. Shrewsbury,* 808 F.2d 1023, 1032-1033 (3d Cir. 1987). One of two limiting principles based on this authority is that even where distinct, investment-backed expectations are involved, a taking through an exercise of the police power occurs only when the regulation "has nearly the same effect as the complete destruction of the property rights of the owner." *Id.* at 1033.

In the instant case, plaintiffs allege that their investment for renovation to build a dance hall was based on the expectation that they would obtain the dance hall license as soon as all the requirements of, the state ordinance had been met. Plaintiffs allege that they were uninformed of the imposed conditions of neighborhood objections. They further allege that they lost all of their monetary and property investments by virtue of the City's denial of the dance hall license since dancing is absolutely necessary to the financial survival of such a club.

Defendants rely on *Bello v. Walker,* 840 F.2d 1124, 1131 (3d Cir. 1988) where the plaintiffs were denied a particular building permit and but nevertheless retained the right to put their land to a variety of alternative uses; the actions of the defendants in *Bello* did not deny plaintiffs all use of their property. Furthermore, the defendants rely on *First Evangelical Lutheran Church of Glendale v. County of Los Anqeles,* 107 S.Ct. 2378 (1987), wherein the Supreme Court held that no taking results in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances and the like . . .". However, defendants' reliance on these cases is misplaced. In *Bello,* plaintiffs were denied a particular building permit before the actual construction or renovation of a building had commenced and significant resources had been expended. In the instant case, the dance hall license was denied after the plaintiffs have invested hundreds of thousands of dollars in the renovation of the dance hall structure. Moreover, unlike the situation in *First Evangelical Lutheran,* the plaintiffs here have provided sufficient evidence for purposes of summary judgment to show that the initial denial of the dance license may have been for reasons that cannot by characterized as merely "normal delays" in the licensing approval process. Accordingly, defendants' motion for summary judgement on Count V of plaintiffs' Complaint alleging an unconstitutional taking of property shall be denied.

I. Defendants' Motion for Summary Judgment on Count VI of the Complaint alleqing violation of RICO.

Plaintiffs allege that the City of Philadelphia and Councilman Tayoun are liable for violating the Racketeer Influenced and Corrupt Organizations Action ("RICO"), 18 U.S.C. § 1961(c)(d).[1] RICO provides in relevant part:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

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[1] Neither the original complaint (at § 95) nor the plaintiffs' response to defendants' Motion for Summary Judgment indicate which specific RICO provisions are alleged to have been violated. This court is guided solely by defendants' reading of the relevant statutory language to include only § 1962(c)-(d).

42 U.S.C. § 1962(c). This section has been interpreted to comprise the following elements:

> 1) the existence of an enterprise affecting interstate commerce; 2) that the defendant was employed by or associated with the enterprise; 3) that the defendant participated, either directly or indirectly, in the conduct or the affairs of the enterprise; and 4) that he or she participated through a pattern of racketeering activity that must include the allegation of at least two racketeering acts.

Shearing v. E.F. Hutton Group, Inc., 885 F.2d 1162, 1165 (3rd Cir. 1989). Defendants are entitled to Summary Judgment as a matter of law because the complaint fails to satisfy any of the requisite RICO elements.

Initially, the City of Philadelphia seeks summary judgment because, as a matter of law, a municipality cannot form the requisite intent to give rise to liability under RICO. *See Albanese v. City Federal Savings and Loan Ass'n.* 710 F. Supp. 563 (D.N.J. 1989); *North Star Contractinq v. Long Island RR.*, 723 F. Supp. 902 (E.D.N.Y. 1989). As plaintiffs direct this court to consider only the RICO allegation against Councilman Tayoun, I shall grant defendant City of Philadelphia's Motion for Summary Judgment.

Further, as stated in plaintiff's response to the governmental defendants' Motion for Summary Judgment, "Councilman Tayoun is the only governmental defendant who was part of the illicit scheme to drive After Midnight out of business." (Plaintiffs' Response at 44). Accordingly, the court shall dismiss any other RICO claims against the remaining governmental defendants.

None of Councilman Tayoun's actions qualify under RICO's definition of "racketeering activity." RICO defines the punishable offenses as "any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotics or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year." 18 U.S.C. § 1961(1)(a). After reviewing the applicable Pennsylvania state statutes, and the clear irrelevance of all the section 1961 predicate crimes, this court finds no valid RICO claim as against Councilman Tayoun.

Because the court finds no predicate RICO activity it is unnecessary to address the second RICO requirement that a pattern of racketeering activity exists.[2]

Based on the foregoing discussion, I shall grant defendants City of Philadelphia's and Councilman Tayoun's Motions for Summary Judgment on Count VI of plaintiffs' complaint alleging RICO violations.

IV. Plaintiffs' Motion for Partial Summary Judgment.

Plaintiffs seek partial summary judgment against the City of Philadelphia on the basis that their substantive due process rights were violated by the City's application of its established, though allegedly unpublished procedure for awarding dance hall licenses to plaintiffs' businesses, After Midnight and Down South. The plaintiffs maintain that there are no material questions of fact remaining regarding the nature of this established procedure and therefore the City is liable pursuant to § 1983 for deprivations of civil rights occasioned by its use.

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[2] Again, pursuant to this court's July 19, 1990, order denying Plaintiffs' Motion to Amend the Complaint, the court need not consider plaintiffs' alleged mail fraud RICO violation pursuant to 18 U.S.C. § 1961(1) as it is no longer an issue before the court.

The court finds, as discussed above, that the plaintiffs must prove that the procedure used by the defendants in reviewing the license application was a deliberate and arbitrary abuse of governmental power and therefore constituted an impermissible violation of plaintiffs' rights to due process. However, as previously discussed, it appears clear, from the evidence provided by both sides, that reasonable minds could differ as to whether the defendants' actions were irrational and capricious. The court finds that the issue is best left to the fact-finder at trial and shall, accordingly, deny plaintiffs' motion for partial summary judgment.

An appropriate order follows.

s/ Clarence C. Newcomer
Clarence C. Newcomer, J.

Appendix D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OP PENNSYLVANIA

CIVIL ACTION

NO. 90-0132

MIDNIGHT SESSIONS, LTD., CIVIL ACTION t/a AFTER MIDNIGHT, et al.,

Plaintiff,

v.

CITY OF PHILADELPHIA, et al.,

Defendants.

ORDER

AND NOW, this 23rd day of July, 1990, upon consideration of the Governmental Defendants' Motion for Summary Judgment, and the response thereto, and consistent with the foregoing Memorandum, it is hereby ordered that said motion is GRANTED in part and DENIED in part as follows:

1. Defendant City of Philadelphia's Motion for Summary Judgment as to Municipal Liability is DENIED;

2. Defendants Plonski's, Mosley's, Cole's, D'Agostino's, Kessler's, Jordan's, Lynn Rabutino's, Schmolinger's, and Thomas' Motions for Summary Judgment under Qualified Immunity are DENIED.

Appendix D

3. Defendant Henry Herling's Motion for Summary Judgment is GRANTED;

4. Defendant Councilman Tayoun's Motion for Summary Judgment on the basis of qualified immunity is GRANTED;

5. Defendant Members of the Board of Licenses and Inspection Review's Motion for Summary Judgment on the grounds that they are immune from suit under Judicial Immunity is DENIED;

6. Defendants' Motion for Summary Judgment on Count I of plaintiffs' Complaint alleging a deprivation of substantive due process is DENIED.

7. Defendants' Motion for Summary Judgment on Count II of plaintiffs' complaint alleging a deprivation of Equal Protection is GRANTED;

8. Defendants' Motion for Summary Judgment with respect to that part of Count III of plaintiffs' complaint alleging Intentional Discrimination on account of race is DENIED.

9. Defendants Motion for Summary Judgment with respect to that part of Count III of plaintiffs' complaint alleging Conspiracy is GRANTED.

10. Defendants' Motion for Summary Judgment on Count IV of plaintiffs' complaint alleging Deprivation of Procedural Due process is DENIED.

11. Defendants' Motion for Summary Judgment on Count V of plaintiffs' complaint alleging an Unconstitutional Taking of Property is DENIED.

12. Defendants' Motion for Summary Judgment on Count VI of plaintiffs' complaint alleging a violation of the Racketeer Influenced and Corrupt Organization Act is GRANTED.

13. Plaintiffs' Motion for Partial Summary Judgment is DENIED.

AND IT IS SO ORDERED.

s/ Clarence C. Newcomer
Clarence C. Newcomer

APPENDIX E — MEMORANDUM AND ORDER OF THE DISTRICT COURT AWARDING ATTORNEY'S FEES FILED JANUARY 10, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MIDNIGHT SESSIONS, LTD. t/a AFTER MIDNIGHT, et al.

v.

CITY OF PHILADLPHIA, et al.

CIVIL ACTION

NO. 90-0132

MEMORANDUM

Newcomer, J.

January 10, 1991

This is a civil rights case involving an alleged conspiracy under color of state law to deprive plaintiffs of their rights in designing and operating a nightclub through the defendants' improper use of city agencies and the police force. Plaintiffs, Midnight Sessions, Ltd., t/a After Midnight, et al., are a corporate entity which designed and constructed two nightclubs in Philadelphia. On January 8, 1990, plaintiffs brought this case alleging causes of action pursuant to 42 U.S.C. § 1983, and the fifth and fourteenth amendments, arguing that defendant's conduct resulted in an unconstitutional taking of plaintiffs' property. On August 1, 1990, the jury returned a verdict in favor of plaintiffs finding that defendant had violated plaintiffs' substantive due process rights, and procedural due process rights, and that defendant's conduct resulted in an unconstitutional taking of plaintiff's property. The jury awarded plaintiffs $3,075,000.00 in damages.

Presently before the court is plaintiff's Application for Attorneys' Fees and costs. Pursuant to 42 U.S.C. § 1988, plaintiffs, as the prevailing parties in their § 1983 civil rights action, are entitled to their attorneys' fees and costs. Plaintiffs seek reasonable attorneys' fees, an upward adjustment of the fees (contingency enhancer), costs, expert fees, attorneys' fees for the fee application and immediate payment of these fees. After careful consideration of plaintiffs' application, the response thereto, and the entire record of the case, the court shall award attorneys' fees and costs as specified in the rest of this opinion.

I. Factual Background

The fees and costs requested are related to the planning, researching, drafting and filing of plaintiffs' complaint, opposition to various motions to dismiss and motions for summary judgment filed by defendants, plaintiffs' motions for summary judgment and preparation for and participation in the related proceedings including the trial of the case. Plaintiffs also request fees and costs related to drafting and filing motions for discovery requests, interrogatories, and preparation for, and attendance at, numerous depositions. A brief outline of the proceedings (as set forth in plaintiffs' petition) follows.

In August of 1989 plaintiffs, after discussing their case with other firms who refused to accept the case, met with attorneys regarding the possibility of retaining Powell, Trachtman, Logan & Carrle as counsel for their civil rights claim against the City of Philadelphia. After reviewing the facts with plaintiffs and preparing and distributing a memorandum of the facts of the case to the other members of the firm, Mr. Trachtman had a law clerk do preliminary research regarding the fact scenario. Ultimately, Mr. Trachtman agreed to take the case on a full contingency basis, despite the risk of loss and, therefore, the prospect of non-payment after the protracted and complex litigation of this case. The principals of Mr. Trachtman's law firm assented to this arrangement with the expectation that, if successful, they would recover between two to three times their regular billing rate (Plaintiffs' Petition p. 2).

On January 8, 1989, plaintiffs filed an extensive complaint alleging that the defendant city's policies regulating the licensing of dance halls violated plaintiffs' civil rights. Plaintiffs' attorneys had to then embark on a seven-month period devoted to extensive discovery, research and trial preparation. Plaintiffs first drafted and served many detailed interrogatories and document requests before any defendant had answered the complaint. Plaintiffs also had to file several discovery motions to exact responses from the defendants which eventually resulted in hundreds of pages of answers to the interrogatories and thousands of documents.

After the filing of the complaint, defendants filed a motion to dismiss. Plaintiffs had to respond to this motion which the Court ultimately denied on May 31, 1990. Following the denial of Defendants' Motion to Dismiss, the parties had to conduct discovery within a 90-day discovery period ending on July 2, 1990. During this period of discovery, plaintiffs' counsel had either taken or attended the depositions of Robert D'Agostino, Captain Clifford Barcliffe, Alan Kessler, Lieutenant W. Kase, Sergeant Grutzmacher, Gussie Chudnoff, Dorothy Gallman-Williams, Cureley Cole, John Plonski, Henry Herling, Clarence Mosley;, Charles Duncan, James Tayoun, Leslie Gerstein, John Marini, Lt. Robert Pitney, Sgt. John Shaw, Flora Wolf, Joan Baizer, Jane Robinson, Marvin Finkelstein, Rick Snyderman, David Wismer, Mark Levy, Andrew Toy, Sally Hunter, Richard Singer, James Helman, Donald Welch, Alan Manoff and Jack Manoff.

After the end of the discovery period, this court required all summary judgment motions to be filed by July 5, 1990. This required a complete analysis and summary of the extensive discovery within a relatively short time-frame. Plaintiffs filed one motion for summary judgment on July 5. Defendants filed four motions for summary judgment by the deadline to which plaintiffs had to respond by July 11, 1990. The case went to trial on July 23, 1990 and on August 1, 1990, the jury returned a verdict for the plaintiffs finding that defendant had violated 28 U.S.C. § 1983 by denying plaintiffs their substantive and procedural due process rights, and by unconstitutionally taking plaintiffs' property. The jury awarded damages of $3,075,000.00.

II. Legal Standards

Under 42 U.S.C. § 1988, the court may allow reasonable attorneys' fees to the prevailing party in a suit brought under 42 U.S.C. § 1983. To be considered a "prevailing party," the plaintiff "must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant." *Texas State Teachers Ass'n v. Garland Indep. School Dist.*, No. 87-1759, slip op. at 9 (U.S. March 28, 1989). If the plaintiff succeeds on " 'any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit' the plaintiff has crossed the threshold to a fee award of some kind." *Id.* Success on a legal claim which can be characterized as "purely technical or de minimis," however, would justify a finding that plaintiff is not a prevailing party for § 1988 fee purposes. *Id.*

Appendix E

Assuming "prevailing party" status exists, the district court must make an initial estimate of a reasonable attorneys' fees, commonly referred to as the "lodestar," by multiplying the number of hours reasonably expended by a reasonable hourly rate. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). In determining the time spent and the nature of the services provided, "it is not necessary to know the exact number of minutes spent nor the precise activity to which each hour was devoted . . . [y]et some fairly definite information as to the hours devoted to various general activities" is required. *Pawlak v. Greenawalt*, 713 F.2d 972, 978 (3d Cir. 1983), *cert. denied*, 464 U.S. 1042 (1984). The focus is on whether the documentation permits determination of the reasonableness of the fees requested, and outright denial of requested fees for lack of adequate documentation will be appropriate only in very limited circumstances. *Id.* Hours not reasonably expended on the litigation must be excluded from the calculation. *Hensley*, 461 U.S. at 434.

Other considerations, including the results obtained, may lead the district court to adjust the lodestar upward or downward. *Hensley*, 461 U.S. at 434. First, in situations when the prevailing plaintiff has succeeded on only some of their claims, an award of fees for time expended on unsuccessful claims may not be appropriate. *Id.*, 461 U.S. at 436. In such situations, the court "should consider whether or not the plaintiff's unsuccessful claims were related to claims on which he succeeded, and whether the plaintiff achieved a level of success that makes it appropriate to award attorneys' fees for hours reasonably expended on unsuccessful claims. . . ." *City of Riverside v. Rivera*, 477 U.S. 568 (1986). When a plaintiff achieves limited success in civil rights cases involving a common core of facts and related legal theories, the district court should exercise its equitable discretion in arriving at a reasonable fee either by attempting to identify specific hours that should be eliminated or by simply reducing the award to account for the limited success of the plaintiff. *Texas State Teachers Ass'n v. Garland Indep. School Dist.*, No. 87-1759, slip op. at 7 (U.S. March 28, 1989) (citing *Blanchard v. Bergeron*, 489 U.S. ____, ____ (1989)). On the other hand, "[w]here a plaintiff has obtained excellent results, his attorney should recover a full compensatory fee" and "the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit." *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983).

Second, the Supreme Court has rejected the proposition "that fee awards under § 1988 should necessarily be proportionate to the amount of damages a civil rights plaintiff actually recovers." *City of Riverside v. Rivera*, 477 U.S. 561, 574 (1986); *see also Cunningham v. McKeesport*, 807 F.2d 49, 51-54 (3d Cir. 1986), *cert. denied*, 481 U.S. 1049 (1987) (citing *City of Riverside*). And last, the most critical factor in determining an appropriate fee award is the degree of success obtained. *Hensley*, 431 U.S. at 436.

In considering the reasonableness of a § 1988 fee request, the Supreme Court has often referred to the factors set forth in *Johnson v. Georgia Highway Express*, 488 F.2d 714, 717-19 (5th Cir. 1974):

> (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the

> results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Blanchard v. Bergeron, 103 L. Ed. 2d 67, 74 n.5 (1989).[1]

With regard to hourly rates, the court must determine the reasonable hourly rate prevailing in the community for similar work and is required to consider such factors as the expertise, experience, position, and reputation of the attorneys involved. *Pawlak v. Greenawalt*, 713 F.2d 972, 979 (3d Cir. 1983), *cert. denied*, 464 U.S. 1042 (1984). Hours chargeable to claims against defendants who settle or who are found not liable may be charged against remaining defendants only if plaintiffs can show that such time was "fairly devoted to the prosecution of the claim against that specific defendant." *Pawlak*, 713 F.2d at 979. In addition, duplication in hours billed or billings of a large number of hours by several attorneys for strategy and other conferences may warrant reduction in the fee request. *Daggett v. Kimmelman*, 811 F.2d 793, 797 (3d Cir. 1987).

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[1] The Third Circuit has identified the relevant factors in assessing the reasonableness of a fee award as follows:

> the number of hours spent on the litigation; the nature of the services provided; the value of the attorneys' time based on a reasonable hourly rate; the contingent nature of success in the litigation; and 'the extent, if any, to which the quality of the work mandates increasing or decreasing the amount to which the court has found the attorney reasonably entitled . . . The following factors are to be considered in evaluating the quality of the attorneys' work: 'the complexity and novelty of the issues presented, the quality of the work that the judge has been able to observe, and the amount of the recovery obtained.

Pawlak v. Greenawalt, 713 F.2d 972, 977 (3d Cir. 1983), *cert. denied*, 464 U.S. 1042 (1984).

III. The Fee Petition

As a result of their successful prosecution of a $81983 claim, plaintiffs have filed a request for fees and costs as listed below.

A. Fees and Costs Requested

Plaintiffs fee petition seeks the following:

Legal Fees:

Attorney	Hours	Rate	Lodestar
Michael G. Trachtman	654.6	$150.00	$98,190
Jonathan K. Hollin	454.2	125.00	56,775
Ethan N. Halberstadt	279.4	90.00	25,146
Eugene V. Bonner	15.8	90.00	1,422
Paul A. Logan	6.0	150.00	900
Gerald Berkowitz	2.6	125.00	325
Law Clerks	**Hours**	**Rate**	**Lodestar**
Suzanne S. Detar	107.9	$60.00	6,474
William D. Longo	93.0	60.00	5,580
Mark L. Freed	8.7	60.00	522
Eileen M. Coyne	80.7	60.00	4,842

Appendix E

Paralegals	Hours	Rate	Lodestar
Susan M. Bell	213.4	$60.00	$12,804
Fay B. Hunsberger	5.0	60.00	300
		Total Fees:	$213,280

Costs:	
Telephone	$ 45.10
Postage	413.63
Courier	187.25
Telefax Charges	60.08
Duplicating	6,276.00
Computer Research	5,704.89
Travel and Parking	410.35
Meals	127.80
Filing Fees	120.00
Service of Process	399.50
Court Reporter	4,320.60
Witness Fees	710.00
Miscellaneous	288.46
Total Costs:	$19,063.66
TOTAL FEES AND COSTS	$232,343.66

B. Prevailing Party Analysis

Plaintiffs initiated this action to recover damages for the expenses and profits lost by plaintiffs as result of defendants' denial of dance hall permits to plaintiffs. After trial and deliberations a jury returned a verdict in the plaintiffs' favor on plaintiffs' § 1983 claims. The jury awarded damages in excess of 3 million dollars to compensate for out-of-pocket expenses and lost profits.

To be considered a "prevailing party," plaintiffs "must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant." *Texas State Teachers Ass'n v. Garland Indep. School Dist.*, No. 87-1759, slip op. at 9 (U.S. March 28, 1989). If the plaintiff succeeds on " 'any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing the suit' the plaintiff has crossed the threshold to a fee award of some kind." *Id.* Based on the resolution of the instant litigation as described above, it is clear that the legal relationship between the plaintiffs and the defendants has changed; plaintiffs have succeeded on several significant issues and achieved nearly all of the benefits they sought in bringing this suit. Accordingly, the court concludes that plaintiffs are "prevailing parties" for purposes of § 1988 and thus are entitled to pursue a fee award under that statute.

C. Reasonableness of Hourly Rates

The hourly rates requested in the revised fee petition are as follows: Michael G. Trachtman, $150; Jonathan K. Hollin, $125; Ethan N. Haberstadt, $90; Paul A. Logan, $50; Gerald S. Berkowitz, $125; Eugene V. Bonner, III, $90; law clerks William D. Longo, Suzanne S. Detar, Mark L. Freed and Eileen M. Coyne, $60; paralegals Susan M. Bell and Fay B. Hunsberger, $60. These are the regular billing rates for all of the people involved in this litigation. Absent extraordinary circumstances, an attorney's usual billing rate charged to private clients is generally accepted as her or his reasonable rate for fee awards. *Student Public Interest Research Group v. AT & T Bell Lab., (SPIRG)* 842 F.2d 1436, 1445 (3d Cir. 1988) (citations omitted).

Appendix E

Michael G. Trachtman is a name partner in the law firm of Powell, Trachtman, Logan & Carrle. Trachtman received his law degree from the Villanova University School of Law in 1974. While a student at Villanova Law School, Trachtman served as Case and Comment Editor of the Law Review, published two articles in the Law Review, and, upon graduation, was appointed to the Order of the Coif, an honor reserved for those students graduating in the top 10% of the class. After law school Trachtman commenced his career as a practicing lawyer. He has been a litigator for sixteen years. Trachtman has been active in Montgomery County Bar Association activities. He has also practiced law regularly in the Federal Courts. The court also notes that Mr. Trachtman has practiced in front of this court in the past and has successfully litigated claims.

Jonathan K. Hollin is an associate in the Powell firm. Hollin graduated from the Duke University School of Law in 1982. From 1982 to 1984, Hollin served as a Montgomery County District Attorney. He also served as general counsel for a Philadelphia-based company where he supervised litigation and the prevention of litigation. Hollin joined the predecessor to the Powell firm in 1987 and is presently the primary assistant to the chief litigator, Trachtman.

Ethan N. Haberstadt and Eugene V. Bonner, III are associates at the Powell firm. Both graduated from the Villanova University School of Law in May, 1989. Haberstadt and Bonner served as a law clerk to the firm for two years prior to their graduation from law school.

William D. Longo is an associate with the Powell firm. He graduated from the Dickinson School of Law in June, 1990. Longo served as law clerk to the firm during his final year of law school.

Appendix E

Paul A. Logan is a partner in the Powell firm. Logan graduated from the University of Toledo School of Law in 1979. He served as an Assistant Attorney General for the Commonwealth of Pennsylvania, Department of Transportation from 1979 to 1981. He has been in private practice ever since but he has also served as solicitor to Abington Township.

Gerald S. Berkowitz is a senior associate with the Powell firm. He graduated from the Villanova University School of Law in May, 1983. Before entering private practice, Berkowitz served as corporate counsel for a major transportation company. He is responsible for the firm's corporate and commercial law practice.

Suzanne S. Detar is a third year law student at Temple University School of Law and worked as a summer associate at the Powell firm during the summer of 1990. Mark L. Freed, Eileen M. Coyne are both third year law students at the Villanova University School of Law and were summer associates with the firm during the summer of 1990.

Susan M. Bell is a paralegal in the Powell firm. She attended Cedar Crest College where she received a Bachelor of Science Degree in Business Administration and an ABA Approved Paralegal Certificate in 1986.

Fay B. Hunsberger is also a paralegal for the Powell firm. She graduated from Bloomsburg University in 1984 receiving her Bachelor of Science Degree in Business Accounting. In 1984 she attended the Institute of Paralegal Training and received an ABA Approved Paralegal Certificate.

In light of the outstanding qualifications of the attorneys, law clerks and paralegals working on this case, as well as this court's experience with fee petitions in other cases and the reasonableness of the hourly rates therein, *see e.g. Jane Roe v. Operation Rescue,* No. 88-5157 (E.D. Pa. May 1, 1989) (LEXIS, Genfed 4688) (Newcomer, J.), the court finds that the hourly rates requested are entirely reasonable. Accordingly, the court will approve the requested rates.

D. Reasonableness of Amount of Time Incurred

1. *Time Related to Non-Productive Time and Unsuccessful Claims*

Plaintiffs have stated that they eliminated from the petition all time spent and costs incurred related to non-productive time and time spent on claims which eventually were unsuccessful. For instance, plaintiffs have stated that they do not seek compensation for time spent in responding to private defendants' motion for summary judgment or plaintiffs' unsuccessful motion to amend the pleadings. While review of plaintiffs' billing summaries indicates that such reductions have been made, the court notes that certain descriptions of such activities have been deleted without a corresponding reduction in the number of billable hours recorded for the particular day.[2] The court also notes that certain non-productive hours did not get eliminated from the firm's billing records.[3]

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[2] The following hours will be reduced; *Hollin,* 2/14/90, 1 hour; 3/19/90, 1 hour; 3/20/90, 3.35 hours; 3/21/90, 2.25 hours; *Haberstadt,* 3/21/90, 3.07 hours; 5/15/90, 1.3 hours; 5/22/90, 3.35 hours; 5/23/90, 3.0 hours; 6/7/90, 2.25 hours; 6/26/90, 4.55 hours; 7/3/90, 3.0 hours; 7/5/90, 3.05 hours; 7/6/90, 3.0; 7/10/90, 2.0; *Trachtman,* 7/10/90, 3.0 hours.

[3] The following hours will be reduced: *Coyne,* 7/13/90, 4.0 hours; *Trachtman,* 11/17/90, 2.25 hours; 1/27/90, .3 hours; *Hollin,* 3/6/90, .75 hours.

2. *Miscellaneous Other Matters*

In situations when plaintiffs succeed on some but not all claims presented, the court must "consider whether or not the plaintiff's unsuccessful claims were related to claims on which he succeeded, and whether the plaintiff achieved a level of success that makes it appropriate to award attorneys' fees for hours reasonably expended on unsuccessful claims . . . " *City of Riverside v. Rivera,* 477 U.S. 561, 568 (1986). "[W]here a plaintiff has obtained excellent results, his attorney should recover a full compensatory fee" and "the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit." *Hensley v. Eckerhart,* 461 U.S. 424, 435 (1983). Based on these principles, the court finds that plaintiffs' counsel in the instant matter obtained superb results and concludes that no reduction in the fee award is warranted simply because plaintiffs failed to prevail on every claim raised in the instant matter.

Defendants have raised various other challenges to plaintiffs' calculation of the hours expended by plaintiffs in this litigation. The court has reviewed and considered these other matters and finds that they do not warrant any reduction or modification beyond those already set forth in this memorandum.

3. *Summary of Fees Approved*

After reviewing and recalculating the hours pursuant to this memorandum, this court finds that the attorneys' fees approved consist of the following:

Attorney	Hours	Rate	Lodestar
Michael G. Trachtman	649.05	$150	$97,357.50
Jonathan K. Hollin	445.85	125	55,731.25
Ethan N. Halberstadt	247.08	90	22,237.20
Eugene V. Bonner	15.80	90	1,422.00
Paul A. Logan	6.00	150	900.00
Gerald Berkowitz	2.60	125	325.00

Law Clerks	Hours	Rate	Lodestar
Suzanne S. Detar	107.9	$60	$6,474.00
William D. Longo	93.0	60	5,580.00
Mark L. Freed	8.7	60	522.00
Eileen M. Coyne	66.6	60	3,996.00

Paralegals	Hours	Rate	Lodestar
Susan M. Bell	207.2	$60	12,432.00
Fay B. Hunsberger	5.0	60	300.00

TOTAL AUTHORIZED ATTORNEYS' FEES $207,276.95

E. Contingency Multiplier

Plaintiffs contend that a contingency multiplier is appropriate in this case because their attorneys faced the risk of total nonpayment and because it is necessary to insure that civil rights plaintiffs, as a class, can retain competent counsel.

The issue of when it is appropriate for a district court to award successful plaintiffs a contingency multiplier is one that has proven rather complicated and "elusive" due to the fact that to date, "the Supreme Court has been unable to produce a majority opinion on the issue." *Blum v. Witco Chemical Corp.*, 888 F.2d 975 (3d Cir. 1989) (Sloviter, J.). In *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,* 107 S.Ct. 3078, 97 L.Ed.2d 585 (1987) (*Delaware Valley II*), the Supreme Court, in a 4-1-4 decision, upheld the availability of contingency multipliers but refused to apply one in the case before it. Four justices would have held that contingency multipliers are improper under any circumstances, stating that "in the absense of further legislative guidance, we conclude that multipliers or other enhancement of a reasonable lodestar fee to compensate for assuming the risk of loss is impermissible under the usual fee-shifting statutes." *See,* 107 S.Ct. at 3087 (White, J., joined by Rehnquist, C.J., Powell, J., and Scalia, J.). Four justices would have permitted them. *See* 107 S.Ct. at 3091 (Blackmun, J., joined by Brennan, J., Marshall, J., and Stevens, J., dissenting). Justice O'Connor concurred with the White plurality on narrower grounds, recognizing, along with the dissenters, the possibility that contingency enhancement might be appropriate in some cases but denying it under the facts of *Delaware Valley II.* Because the four dissenters would allow contingency multipliers in all cases in which Justice O'Connor would allow them, her position commands a majority of the court. *SPIRG,* 842 F.2d at 1451. *See also Blum,* 829 F.2d at 379-82.

In a series of recent opinions since *Delaware Valley II,* the Third Circuit has gone to great effort to interpret the divided holding of the Supreme Court on this issue and to provide the district courts with some clear guidance and principles to apply when reviewing fee applications that include requests for a contingency multiplier. The Third Circuit has held, in interpreting the mandate of *Delaware Valley II,* that one central theme elicits the agreement of the otherwise divided Supreme Court. *SPIRG,* 842 F.2d at 1451. All of the justices "seem to agree that the ultimate inquiry in establishing a reasonable fee must be the rate necessary to attract competent counsel, and that contingency multipliers should be awarded only when necessary to attract such counsel." *See id.*, Citing *Delaware Valley II,* 107 S.Ct. at 3079 (White, J. plurality opinion); (a multiplier is only available where "the applicant can establish that without an adjustment for risk the prevailing party 'would have faced substantial difficulties in finding counsel in the local or other relevant market.'" (O'Connor, J., concurring) (quoting Justice White's plurality opinion)); *id.* at 3091, 3092-93, 3094 (Blackmun, J. dissenting).

In *Rode v. Dellarciprete,* 892 F.2d 1177 (3d Cir. 1990), the Third Circuit held that contingency multipliers are necessary "to compensate counsel for the riskiness of undertaking the litigation." *Id.* at 1184 (quoting *SPIRG,* 842 F.2d at 1451). However, the *Rode* Court cautioned that a contingency multiplier is only to be granted in rare cases and that the fee applicant has a significant burden to carry to obtain a contingency multiplier. *Id.* To meet this burden, the applicant must show:

> 1) how the market treats contingency fee cases as a class differently from hourly fee cases;
>
> 2) the degree to which the relevant market compensates for contingency;
>
> 3) that the amount determined by the market to compensate for the contingency is not more than would be necessary to attract competent counsel for both in the relevant market and in its case; and

> 4) that without an adjustment for risk the prevailing party would have faced substantial difficulties in finding counsel in the local or other relevant market.

Id. (citations omitted).

After careful review of the numerous affidavits and the briefs submitted by the parties, and the applicable law, the court finds that plaintiffs have satisfied the criteria of *Delaware Valley II* and are entitled to a contingency multiplier. Exhibit H of the Fee Application provides various declarations from representatives of firms in Montgomery County. Each declarant states that their firm looks upon contingent fee cases with disfavor and that the partners in their firms would not approve the taking of a contingent fee case without the expectations of a 2 to 3 times contingency multiplier of the attorney's usual rate. Furthermore, Exhibit F indicated that plaintiffs tried to seek counsel elsewhere but were turned away due to plaintiffs' requirement that counsel take the case on a contingency fee basis. Exhibit G, the affidavit of the partners of the Powell, Trachtman firm, states that they would not have chosen to take the case without the possibility of payment at 2 to 3 times their normal hourly rates.

In *Black Grievance Committee v. Philadelphia Electric Co.*, 690 F. Supp. 1393 (E.D. Pa. 1988), this court granted plaintiffs a 200% contingency enhancer when plaintiffs provided evidence, in the form of affidavits, of the difficulties encountered in obtaining counsel and the manner in which contingent fee litigation is compensated in the Philadelphia area. On this latter point, plaintiffs submitted affidavits which contended that attorneys in the Philadelphia area will accept contingent cases in civil rights actions only if their recovery would be at least double or triple their normal billing rate. For example, plaintiffs submitted the affidavit of Henry T. Reath, and experienced lawyer and partner in the firm of Duane, Morris & Hecksher, who explained:

> In order to obtain approval of the [firm's] Contingent Fee Committee [to take the contingent fee case], there must be a strong showing at the outset of litigation that the chances of success are favorable. In addition to this showing, a case will not be approved for contingent representation unless the firm has a reasonable expectation of receiving at lease double or triple its normal hourly fees in the event of success.

Black Grievance, 690 F. Supp. at 1400. Mr. Reath further stated:

> The Contingent Fee Committee has not been reluctant to turn away business, and has only approved contingent fee representation in a few instances in which the prospect of fee recovery accounted for an enhancement for contingency.

Id.

Plaintiffs in the present case have attached to their fee application all of the affidavits which were submitted and relied upon by this court in *Black Grievance.* (Exhibit "I", Plaintiffs' Application). While these affidavits were not prepared specifically for this case, this fact does not undermine their usefulness in demonstrating the need for contingency enhancers in civil rights cases. As was carefully explained by a plurality of the Supreme Court in *Delaware Valley II*, a court's focus should be placed on the difficulty of obtaining competent counsel in the local market

— not in any one particular case. 107 S.Ct. at 3091 (O'Connor, J., concurring). These affidavits bear witness to the difficulties facing civil rights litigants in obtaining competent counsel in the Philadelphia area.

Plaintiffs have submitted additional affidavits of local attorneys who explain the risks associated with contingency cases — particularly in the area of civil rights — and that they will not accept a contingency case unless they have a reasonable expectation of receiving at least double or triple their normal billing hourly fees in the event of success.

The principals in Powell, Trachtman, Logan & Carrle, Michael G. Trachtman, Paul A. Logan and Gunther O. Carrle, have submitted a joint affidavit stating that they will not accept a contingent fee case in civil rights cases such as this one unless there is a prospect of recovering between two and three times their ordinary billing rate.

In addition, Plaintiffs have submitted the affidavit of Donald Welch, a plaintiff in this action, which verifies the difficulty he faced in obtaining competent counsel in this case. Before Mr. Welch came upon Mr. Trachtman, several other attorneys had declined representation because of the inherent risks of a contingency arrangement.

Furthermore, it is important to note, as plaintiffs have correctly argued, that a contingency multiplier does not result in any "windfall" to either the plaintiffs or the attorneys. The purpose of an attorneys' fee award under § 1988 is to compensate a plaintiff, not his counsel, for attorneys' fees expended in vindication of his civil rights. This important distinction was recently made clear by a unanimous Supreme Court in *Venegas* *v. Mitchell*, 110 S.Ct. 1679, 109 L.Ed.2d 74 (1990). Thus, a plaintiff who retains counsel on a contingent fee and who recovers $3 million as a result of civil rights violations must typically pay between $1 to $1.5 million in attorneys' fees. These attorneys' fees reduce the effective amount of the jury's verdict, even though the jury does not take this into account when calculating damages. Even if the plaintiffs' attorneys prevail on a fee application for $400,000, or more, this recovery barely dents the contingency fee which the plaintiffs are contractually obligated to pay their attorneys — a contingency fee that was absolutely necessary in order to attract competent counsel.

In an appropriate case, prevailing plaintiffs may be entitled to the full amount of the contingency arrangement, provided that they can establish that the full amount of the contingency is a reasonable attorneys' fee. *See Hagge v. Bauer*, 827 F.2d 101 (7th Cir. 1987) (40% contingency represented a reasonable fee under § 1988). Plaintiffs herein do not seek such an award. Nonetheless, they are entitled to a reasonable attorneys' fee, taking into the account the enhanced billing rate of attorneys in civil rights contingency cases in the Philadelphia area.

Finally, the defendant has attempted to discredit plaintiffs' request for a contingency multiplier by characterizing plaintiffs' action as "not a novel or complex case." (Defendant's Memorandum in Opposition, p. 10). I disagree. Defendant's characterization is incorrect and is not supported by the facts. However, I note that the issue of whether this individual case was novel or particularly complex is not the relevant or appropriate focus in determining the merits of plaintiffs' request for a contingency multiplier under current law. *See Delaware Valley II*, 483 U.S. at 731, 107 S.Ct. at 3089 (compensation for contingency must be based on the difference in market treatment of contingent fee cases as a class, rather than on an assessment of the "riskiness" of any particular case).

After careful review of the numerous affidavits and briefs submitted by the parties and the applicable law, the court finds that plaintiffs have convincingly met their burden and have demonstrated, with the requisite evidence mandated by the Supreme Court and the Third Circuit as discussed above, that they are entitled to a contingency multiplier for their efforts.

The court must now address the question of the amount that the fees should be enhanced by. The Third Circuit has made it painfully clear that this determination may not be made by the district court's own intuition but, rather, must be reached by applying a reasonable "market-based quantitative finding." *Blum,* 888 F.2d at 983. The affidavits submitted on plaintiffs' behalf provide this court with the necessary basis to make a market-based, quantitative finding. As with the record in *Black Grievance Committee,* the record herein does include a substantiated amount by which fees need to be enhanced. The affidavits submitted attest that the local market treats contingency fee cases as a class differently from hourly fee cases and that local attorneys who consider accepting contingency cases — particularly in the area of civil rights — will not accept such cases unless they have a reasonable expectation of receiving at least double or triple their normal billing hourly fees in the event of success. Defendant has not made any attempt to contradict plaintiffs' affidavits by producing evidence that there are attorneys in the Philadelphia area who will undertake civil rights cases on a purely contingent fee basis. Plaintiffs have shown through their affidavits that the market compensates for contingency cases at a rate of approximately 200% and that it would be significantly more difficult for plaintiffs to obtain counsel willing to handle civil rights actions if plaintiff's counsel had no prospect of receiving a contingency enhancer.

I conclude that, based on the affidavits, a 200 percent enhancer is necessary, and appropriate, to attract competent counsel without producing a windfall to the attorneys.

F. Costs

Plaintiffs request payment for the costs they incurred in this litigation. In addition to costs such as filing fees, service fees, court reporters, witness fees and copying fees which 28 U.S.C. § 1920 mandates, plaintiffs also request payment for travel, meals, telephone, postage and other charges. Defendants counter that the latter costs are not taxable under § 1920 and should, therefore, not be awarded. After consideration of these two arguments, the court finds that the costs requested are reasonable, with the exceptions noted below.

In *Rank v. Balshy*, 590 F.Supp. 787, 803 (M.D.Pa. 1984), the court stated "[w]hen a statute shifts the typical burden of attorney fees and costs, the traditional limitations of 28 U.S.C. § 1920 do not necessarily apply, particularly in civil rights cases." *Id.* (citations omitted). The *Rank* Court, in deciding what costs were permissible looked to the purpose of § 1988, which is to ensure the effective enforcement of civil rights laws by creating financial feasibility to litigate cases. *Id.* The court further stated that "[t]he factually complex and protracted nature of civil rights litigation frequently makes it necessary to make sizable out-of-pocket expenditures which may be as essential to success as the intellectual skills of the attorneys." *Id.* (quoting *Dowdell v. City of Apopka, Florida*, 698 F.2d 1181, 1190 (11th Cir. 1983)).

Accordingly, the court will order the payment of the costs for all items requested with the following exception. The court will reduce the travel, parking and meals expenditures by one-half since plaintiffs' counsel failed to indicate to whom the various expenses were attributable. Accordingly, the court will award plaintiffs $18,794.59 for the costs of litigating this case.

G. Expert Witness Fees

Plaintiffs request remuneration for the full amount of fees expended on obtaining the testimony of expert witnesses. These fees totaled $26,520 for the services of two experts. Defendants contend that expert witness fees are not allowed under the present law in the Third Circuit. The defendants' argument on this point is correct. In *West Virginia Hospitals, Inc. v. Casey,* 885 F.2d 11, 34-35 (3d Cir. 1989), *cert. denied,* 110 L.Ed.2d 661 (1990), the Third Circuit held that the 28 U.S.C. § 1821 limitation of witness fees to thirty dollars ($30) per day applied to attorneys' fees and costs petitions filed pursuant to 42 U.S.C. § 1988 and that a district court could not award expert witness fees in excess of the statutorily imposed limits.

Since the plaintiffs failed to include any summary of the number of days each expert witness served, the court cannot calculate the amount of expert witness fees appropriate for this case. Plaintiffs, in order to receive such witness fees, must file affidavits indicating the number of days plaintiffs employed each expert witness.

H. Attorneys' Fees for the Fee Application

Plaintiffs request attorneys' fees for the preparation of the fee application. The fees are broken down in the chart below:

Attorney	Hours	Rate	Lodestar
Michael G. Trachtman	14.0	$150	$2,100.00
Jonathan K. Hollin	2.2	125	275.00
Ethan N. Haberstadt	57.7	90	5,193.00
Mark L. Freed	.4	60	24.00
William D. Longo	.4	60	24.00
Suzanne S. Detar	.5	60	30.00
Eileen M. Coyne	.4	60	24.00
Total:			$7,670.00

Defendant does not contest this request. However, after, careful and exhaustive review of plaintiffs' Application, all supporting materials, and all affidavits submitted in connection with this application, the court finds that the amount of time, a total of 75.6 hours, that plaintiffs expended in the preparation of this Application is excessive and unreasonable. Accordingly, the court shall reduce by half, to $3,835.00, the attorneys' fees requested by plaintiff for this Fee Application.

I. Immediate Payment of the Attorneys' Fees

Plaintiffs seek immediate payment of their attorneys' fees and costs. A Plaintiff who has prevailed on the mertis of his claim is entitled to prompt payment of the attorneys fee award granted for that success. *See Hanrahan v. Hampton,* 446 U.S. 754 (1980) (prompt payment of attorneys fees is appropriate even at interlocutory stages of litigation). This case has proceeded to trial and the jury has returned a substantial verdict in favor of plaintiffs. To require plaintiffs to defend their verdict on appeal without any payment of the attorneys' fees and costs to which they are entitled would constitute an undue hardship. Accordingly, the court will order that defendants make prompt payment of the fees and costs mandated by this memorandum.

An appropriate order follows.

s/ Clarence C. Newcomer
Clarence C. Newcomer, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MIDNIGHT SESSIONS, LTD. t/a AFTER MIDNIGHT, et al.

v.

CITY OF PHILADELPHIA, et al.

CIVIL ACTION

NO. 90-0132

ORDER

AND NOW, this 10th day of January, 1991, after consideration of Plaintiffs' Application For Attorneys' Fees Pursuant To 42 U.S.C. § 1988, and the response thereto, and in accordance with the foregoing memorandum opinion, it is hereby Ordered that said motion is GRANTED. It is further Ordered that defendant, City of Philadelphia, PAY plaintiffs the sum of $640,625.44 in attorneys' fees and costs within 30 days from the date of this Order. It is further Ordered that defendant PAY plaintiffs $3,835.00 in attorneys' fees and costs as prevailing parties in connection with Plaintiffs' Application for Attorneys'

Fees. Plaintiffs are granted leave to file a supplemental motion for expert witness fees including affidavits indicating the number of days each expert served.

AND IT IS SO ORDERED.

s/ Clarence C. Newcomer
Clarence C. Newcomer, J.

APPENDIX F — PENNSYLVANIA DANCE HALL ACT, 53 P.S. §§ 4731-4742

ARTICLE VIII. DANCE HALLS

§ 4731. Applicability of act.

This act shall apply to all cities of the first, second, and third classes, within this Commonwealth.

1919, May 16, P.L. 193 § 1.

§ 4732. Definition of terms.

The term "public dance" or "public ball," as used in this act, shall be taken to include any dance or ball conducted in connection with instruction in dancing for hire, and any dance or ball to which admission may be had by the payment of a fee or by the purchase, possession, or presentation of a ticket or token, or in connection with which a charge is made for caring for clothing or other property, and any dance or ball to which the public generally may gain admission with or without the payment of a fee.

The term "dance hall" or "ball room," as used in this act, shall be taken to include any room, place, or space, in which a public dance or public ball, as herein defined, shall be held, and any room, hall, or academy, in which classes in dancing are held and instruction in dancing is given for hire.

1919, May 16, P.L. 193, § 2.

§ 4733. Permit for public dances; fee

From and after the first day of June one thousand nine hundred and nineteen, no person, persons, society, club, or corporation shall hold a public dance or public ball within the limits of any city of the first, second, or third class, within this Commonwealth, without having first obtained a permit therefor from the mayor thereof: Provided, however, Such permit shall not be required for dances held and conducted by regularly established instructors in dancing in connection with such instruction.

The fee for such permit, which shall be paid at the time of the issuing thereof, shall be one dollar for each public dance or ball.

1919, May 16, P.L. 193, § 3.

§ 4734. License for dance halls; application, fee; posting of license.

From and after the first day of June, one thousand nine hundred and nineteen, it shall be unlawful to hold or conduct any public dance or public ball, or to hold or conduct classes in dancing, or to give instructions in dancing for hire, in any hall, ball room, or academy, within the limits of any city of the first, second and third class, within this Commonwealth, unless the dance hall or ball room or academy, in which the same may be held, shall have been duly licensed for such purpose.

Application for such license shall be made by the proprietor of such dance hall or ball room or academy to the mayor, who is hereby authorized to issue the same.

The fee payable for each such license granted hereunder shall be as follows:

In the case of dance halls maintained and conducted in connection with regularly established instruction in dancing, and exclusively used in such connection, the annual license fee shall be thirty-five dollars in cities of the first and second classes and ten dollars in all other cities.

In the case of all other dance halls and ball rooms, the annual license fee shall be forty dollars in cities of the first and second classes and fifteen dollars in all other cities.

Each license granted hereunder shall expire on the first day of June of each year.

The fee payable for each license granted hereunder shall be for the whole or any portion of a calendar year, and all moneys received by way of license fees hereunder shall be paid into the general fund of the city.

Every licensed public dance hall or ball room or academy shall post its license in a conspicuous place within the hall where the dance is held.

1919, May 16, P.L. 193, § 4; 1961, June 15, P.L. 441, § 1; 1961, Aug. 22, P.L. 1024, § 1.

§ 4735. Investigation of applications.

It shall be the duty of the mayor to cause an investigation of all applications for public dance hall or ball room licenses to determine whether or not the dance hall, ball room, or academy, sought to be licensed, complies with the rules, regulations, ordinances, and laws applicable thereto, and, in making such investigation, he shall, when desired, have the assistance of any department of the government of the city.

1919, May 16, P.L. 193, § 5.

§ 4736. Conformity to laws, ordinances and regulations.

No license for a public dance hall or ball room or academy shall be issued until it shall be ascertained that the place for which it is issued complies with and conforms to all laws, ordinances, health and fire regulations, applicable thereto, and is a safe and proper place for the purpose for which it shall be used, properly ventilated, and supplied with sufficient toilet conveniences.

1919, May 16, P.L. 193, § 6.

§ 4737. Revocation of license; renewal

The license of any public dance hall or ball room or academy may be forfeited or revoked by the mayor for disorderly or immoral conduct on the premises, or upon proof that the dance hall, ball room or academy was frequented by disorderly or immoral persons, or for the violation of any of the rules, regulations, ordinances, and laws, governing or applying to public dance hall, ball rooms, or academies, or public dances. If at any time the license of a public dance hall, ball room, or academy shall be forfeited or revoked, at least three months shall elapse before another license or permit shall be granted for dancing on the same premises.

1919, May 16, P.L. 193, § 7.

§ 4738. Hall to be kept clean and sanitary; connecting rooms to be open and lighted

All public dance halls, or ball rooms or academies shall be kept at all times in a clean, healthful, and sanitary condition, and all stairways and other passages and all rooms connected with public dance hall, ball room, or academy shall be kept open and well lighted.

1919, May 16, P.L. 193, § 8.

§ 4739. Inspection by police; vacation of hall

All public dance halls, ball rooms, and academies shall be subject to inspection by the police department of the city at all reasonable times and whenever they are open for dancing, instruction in dancing, or for any other purpose.

Any police officer shall have the power to cause the place, hall or room where any public dance or ball is given, to be vacated whenever any provision of any law or ordinance with regard to public dances and public balls is being violated, or whenever any indecent act shall be committed, or when any disorder of a gross, violent or vulgar character shall take place therein.

1919, May 16, P.L. 193, § 9.

§ 4740. Persons under 16 excluded after 9 p.m.

It shall be unlawful, after nine o'clock post meridian, to permit any person to attend or take part in any public dance who has not reached the age of sixteen years.

1919, May 16, P.L. 193, § 10.

Appendix F

§ 4741. Closing hour for public dances and dance halls

All public dances shall be discontinued, and all public dance halls shall be closed, on or before the hour of one o'clock ante meridian: Provided, however, That upon the application of a bona fide organization or society, and upon an investigation by the proper authority, the mayor may grant such organization or society a permit to continue a dance until two o'clock ante meridian.

1919, May 16, P.L. 193, § 11.

§ 4742. Penalty for violations of act

Any person, persons, society, club, or corporation who shall violate the provisions of this act shall, upon conviction thereof in a summary proceeding, be sentenced to pay a fine of not more than three hundred dollars ($300) and costs of prosecution, and, in default of the payment thereof, shall undergo imprisonment for not more than thirty days.

1919, May 16, P.L. 193, § 12; 1961, Aug. 22, P.L. 1024, § 2.

APPENDIX G — NOTES OF TESTIMONY OF COURT PROCEEDINGS

Manoff - Direct

[14] MR. TRACHTMAN: Yes, sir.

THE COURT: . . . then it would be an exception . . .

MR. TRACHTMAN: Thank you, sir.

THE COURT: . . . and he may so testify. But he still should — if he knows, testify as to who made the statement. Identify the individual . . .

MR. TRACHTMAN: Yes, sir.

THE COURT: . . . person.

Q. Mr. Manoff, you're permitted to — . . .

THE COURT: So, over — for the record, overruled.

Q. . . . you're permitted to explain what the board told you and if you know, or can otherwise identify the person who said it, you should so state as well. If you don't, you don't. A. Well, I don't know the name of the people on the Board, but they said that the neighborhood . . .

MR. FREEMAN: Objection.

THE COURT: Who do you mean when you say they?

MR. MANOFF: Someone from the board . . .

THE COURT: Someone from the board.

MR. MANOFF: Yes.

THE COURT: All right. That's sufficient.

Q. Go ahead, Jack. A. They said that the neighborhood objection was no reason to deny the dance hall license. And, they also said that anything that happened outside on the streets were police business and

* * *

Manoff — Cross

[53] Q. Okay. Go ahead. A. Well, when they told us that there was no reason for them to deny us the license — the dance license for that reason, I took it for granted that was true.

Q. Did you have a lawyer in '85 when you went before the Board, or '86? A. No.

Q. No . . . Okay. Did you have a lawyer in '88 when you went before the board the second time? A. I don't know that. I know we had lawyers on different things, but I couldn't tell you when we went in front — the — Donald Welch handled all that.

Q. Fine. Here — you've just — you told the jury here is the biggest investment you're ever embarking on in your life, right?

THE COURT: You've already asked that . . .

MR. FREEMAN: Okay.

THE COURT: . . . and he's answered it.

Q. You knew that L&I at least had denied your license renewal for the former After Midnight based on the objections of those business neighbors, correct?

MR. TRACHTMAN: Objection. That's not what he said. He said he didn't know whether they were residential neighbors or business neighbors . . .

MR. FREEMAN: Oh.

* * *

Helman—Direct

[102] Basically the same as the old After Midnight was.

Q. Before you started building, did you have to get permits from the City previous to the time that you were allowed to commence this project? A. Yes.

Q. Okay. I'd like to show you some of those applications and some of those permits, if I may, and have you explain them. Initially I'd like to direct your attention to Exhibit P-6. Please take a look at that and tell me if you can identify what that is. A. Yes, this is our application for a zoning permit.

Q. And, what . . . A. And, it's also the approval. It's done on the same form.

Q. What is a zoning permit? A. It says that we can do what we want to do at 10th and Spring Garden Street as far as the zoning laws are concerned.

Q. Okay. On the face — well, just let me — and this is a true and correct copy of your application and the permit? A. Yes, it is.

MR. TRACHTMAN: Your Honor, I'd move Exhibit P-6 as to the . . .

MR. FREEMAN: It's all stipulated to.

MR. TRACHTMAN: All right. Thank you. With res — . . .

THE COURT: Admitted.

MR. TRACHTMAN: May I assume that all City records with [103] regard to this, Mr. Freeman, are stipulated to?

MR. FREEMAN: As long — that is bilateral. So, . . .

MR. TRACHTMAN: Yes. Sure, all City records.

THE COURT: So, give me numbers, can you do that?

MR. TRACHTMAN: I — not off the top, but I believe it would be all of the plaintiff's exhibits save one or two throughout the whole — throughout the entire course.

THE COURT: Well, if that's the case, why don't we say Exhibits P-6 through . . .

MR. FREEMAN: All of them, sir.

THE COURT: . . . P-70 except as any that shall be specially reserved by defendant?

MR. FREEMAN: Very well.

THE COURT: Thank you.

MR. TRACHTMAN: All right.

Q. Mr. Helman, on the — let me direct your attention to Exhibit P-6 to the bottom and ask you whether you disclosed on your application for a zoning permit the nature of the uses that would be ongoing in After Midnight? A. Yes, we did.

Q. What did you tell the City at that time? By the way, what's the date of that? A. October of 1987.

Q. All right. In October of 1987 what did you disclose to the City? [104] A. That we were going to have roller-skating, dancing and live entertainment.

Q. And, you did get your zoning permit as reflected on the face of P-6? A. Yes, we did.

Q. Let me show you what's been marked Exhibit P-7 which says at the top application for building permit. Is this your application for the building permit? A. Yes, it is.

Q. What's a building permit? A. It's a permit required to make any — before you can make any renovations or changes in the physical premises of the building?

Q. Did you have to submit detailed plans to the City in conjunction with obtaining your building permit? A. Well, no, not really in conjunction. We submitted the plans a little later than the building permit application.

Q. Okay. A. You can't actually make any renovations until you have an approved set of plans.

Q. Okay. Did you disclose on the face of your application for the building permit what your usage was that you proposed to build for? A. Yes, we did.

Q. What did it say? [105] A. Dancing, skating and live entertainment.

Q. Let me show you what's been marked as Exhibit P-8 and ask you if you can identify that. A. It's the building permit.

Q. That's issued by the City of Philadelphia? A. That's correct.

Q. Under the topic occupancy it's typed in there as to the uses that you're going to make for this building. By the way, what's the date of this building permit? A. It's November 12th, 1987.

Q. And, with respect to the uses for which this building permit was issued, what does it say? A. Dancing, roller-skating and live entertainment.

Q. Thank you, sir. I want to show you another group of exhibits, Mr. Helman, which we marked all together as Exhibit P-9, all of which are captioned on the top for purposes of speeding this along, lawful occupancy certificate. Do you recognize Exhibit P-9? A. Yes.

Q. Paging through those, what's the approximate dates of Exhibits P-9? A. Well, they're all dated in November — October and November.

Q. Of 1987? A. That's correct.

[106] Q. Are these all documents that are issued to you by the City? A. Well, they're not actually issued to us. These are the documents on which the lawful occupancy signs are based and the lawful occupancy signs are issued to us.

Q. Okay. Who gives you these documents? A. The plans examiner of the City of Philadelphia.

Q. All right. And, it says at the top, Department of Licenses & Inspection? A. That's correct.

Q. And, they're all captioned lawful occupancy certificate? A. That's correct.

Q. With respect to — just to go through some of these — by the way, just — maybe we're skipping a step here. What is the purpose of these documents called Exhibit P-9? Why does the City give these to you? A. Well, you can't operate under the fire code without having a lawful occupancy rating for your building and without posting lawful occupancy signs.

Q. And, when you say lawful occupancy, does that mean that the City determines how many people are allowed to be in particular areas of the building? A. Or in the building itself.

Q. Okay. And, you get these documents from the City which indicates the City's determination as to how many people are permitted? [107] A. That's correct.

Q. All right. Now, with respect to — let's pick one out — the first one, which is dated — has two dates — October 24, '87 and November 4, '87, . . . A. Well, November 4 is the accurate date because that's the signature of the plans examiner.

Q. From the City? A. Yes.

Q. What area does it refer to? A. The dance area.

Q. The second one, what area does that refer to? A. Dance area.

Q. Keep going. Does — the third one, what area does that refer to? A. Dance floor.

Q. Okay. Paging through the rest of these, are they also lawful occupancy certificates issued by the City for various dance floors and dance areas? A. Yes, lobbies, dance floors, dance areas, yes.

Q. Now, was this all before the construction on these items were completed? A. Yes.

Q. Thank you, sir. Mr. Helman, you previously testified that because of and in conjunction with your work at the old After Midnight, you knew about a requirement for a dance hall license [108] to operate a dance hall, is that correct? A. That's correct.

Q. Did you apply for a dance hall license at or around the same time that you were applying for these other permits and licenses? A. Well, it was some months later.

Q. Okay. When is the first time that you sought to apply for a dance hall license? A. In February 1988.

Q. And, why didn't you apply previous to that time? A. Well, we didn't have the premises constructed to the point where we could realistically apply for the licenses.

Q. Well, did you know what the requirements were of the City as to when you were allowed to apply for a dance hall license? A. Yes, I did.

Q. And, what did you know? A. When we were issued our use and occupancy certificate.

Q. And, when does that happen? A. When construction is completed.

Q. Okay. To the best of your knowledge, were you permitted by the City of Philadelphia to apply for a dance hall license before construction was completed? A. To my exact knowledge, I know we weren't allowed to apply for a dance hall license before construction was completed.

Q. And, how did you know that? [109] A. Because we applied in February of 1988 and our application was returned along with our money order. And, there was a notation on the application form that we would have to have a use an op — occupancy certificate before applying.

Appendix G

Q. At any time when you were going through the process in October and November of 1987, for example when you initially applied for the zoning permit you got in October of 1987 and when you applied for the building permit and you got it at around that same time in November of 1987, did anybody from the City contact you or anyone else on behalf of After Midnight and say anything to the effect, look, I see dancing noted on here, here's what you need to know about your dance hall license or anything like that? A. No.

Q. Anybody from the City hand out anything to you as to whether or not you would, in fact, be allowed to use the premises for the dancing use that was noted on here? A. That we would be allowed to use it?

Q. Yeah, any mention of it or discussion of it with City Officials at all? A. There was no discussion with City Officials. The only thing that indicated to us that we would be allowed to use it was the zoning and the building permits.

Q. Now, during the course of the construction itself after you got the zoning permit, after you got the building permit and

* * *

[115] of occupancy issue and what has to precede it? A. Before a building can be used for whatever purpose it's intended for, it must be acknowledged by the City of Philadelphia that the building meets the plans that were submitted in order to do the renovations. That acknowledgment comes in the form of a certificate of occupancy which says you can now use the building for what it was intended for.

Q. Okay. Now, you have two exhibits here, one of which has signatures on it by the plan examiner, the building inspector, housing, fire and the district supervisor in April 27, 1988, the other, October 25, 1988. Can you tell me why the two of them? A. Because they are temporary certificate of occu — certificates of occupancy. In our particular case, we had not finished widening that one set of stairs they wanted us to widen. But, it was not a fire hazard, so the building inspector granted the certificate of occupancy pending the completion of that construction.

Q. Now, each of these certificates of occupancy says on them that the building conforms with the plans approved by the Philadelphia Department of Licenses & Inspections. Are those the plans that you referred to previously that you submitted before — or in conjunction with the building permit? A. That's correct.

Q. And, the requirements, it says, of a current Philadelphia [116] building code and it identifies the addition. Did the inspectors of the City of Philadelphia verify that After Midnight complied in all respects with the Philadelphia building code, to the best of your knowledge, before they gave you . . . A. Well, that is the — they inspect you and they make sure once and for all that the plans have been complied with and then they issue you the certificate of occupancy.

(Pause.)

Q. Did you also at about this time — and about this time is April or so of 1988, just to get the chronology for the jury's benefit. When the certificates issued and the licenses issued and the rest of it that you just went through, did you also, at about this time in April of 1988 or so, apply for your dance hall license? A. Yes, we did.

Q. And, did you do that at the same time that you applied for all these other licenses? A. That's correct.

Q. Okay. Now, let's go back in time if we can. We've covered the chronology with respect to the construction which began in the summer or fall of '87 and, as you pointed out, continued until April of 1988 when these certificates were granted. Let's go back in time and let me ask you a question. During the course of these events that we've just gone over, did there come a time when you discovered that there was some opposition

* * *

[148] A. I don't know . . .

THE COURT: Yes.

Q. That's — I don't want you to speculate. Mr. Freeman is correct. And, your personal beliefs not based on facts don't matter here. The answer to the question is you don't know why it happened? A. No.

Q. During the entire time that After Midnight was open in May of 1988 on those three weekends that you've described, did the City of Philadelphia cite After Midnight for — or charge it or do anything like that with respect to After Midnight for, for example, any noise violations? A. No.

Q. Or parking violations? A. No.

Q. Or serving minors? A. No.

Q. Or being a nuisance? A. No.

Q. Or doing anything wrong not having to do with dance hall situations? A. No.

Q. Any inspectors come and hit you with anything aside from dance hall things? A. No.

[149] Q. Police charges or warnings or anything like that? A. No.

Q. Now, I excluded in my questions dance hall situations. Were you, in fact, received — were you, in fact, served with a citation with respect to not having a dance hall license? A. Well, they're entitled license reports. So, I don't know if they would be citations or not. They were license reports.

Q. From Department of — Philadelphia Department of License & Inspection inspectors? A. That's correct.

Q. And, they leave with you license reports that say you don't have a dance hall license? A. That's correct.

Q. Was that the only thing that was given to you for which you were cited, warned, charged, anything during this entire time in May? A. I believe we were also cited in the same license reports for not having a parking lot license, even though we didn't have a parking lot.

Q. Okay. A. I mean, I don't — I really didn't — never did understand that one.

Q. Nothing other than that? A. No.

Q. During this period of time, May of 1988, did the City or

* * *

[151] A. It was disapproved.

Q. And, does it say on there the basis upon which it was disapproved? A. Yes, it does.

Q. What's it say? A. Objection of neighbors.

MR. FREEMAN: Objection, Your Honor. It doesn't say that.

MR. TRACHTMAN: Well, it says . . .

MR. FREEMAN: It's the whole thing.

MR. TRACHTMAN: Well, it says let's . . .

THE COURT: Well, it says that among other things. You may bring that out on cross.

Q. It says police approval — police disapproval printed and then the typewritten — the only typewritten words on here is what, objection of neighbors? A. Objection of neighbors.

Q. Were you ever notified in conjunction with this of any other reason why the City of Philadelphia Department of Licenses & Inspections denied your application for a dance hall license aside from what's typed on here, objection of neighbors? A. No.

Q. Do you remember the old After Midnight dance hall license renewal denial? [152] A. Yes, I do.

Q. Is that the same reason for that one? A. Yes, it is.

Q. Did they tell you at that time that they served this on you who the neighbors were, who objected? A. No, they did not.

Q. At some subsequent time or at about that time, did you receive from the City a request to appear at what's called an administrative hearing? A. Yes, we did.

Q. Let me show you what's been marked as Exhibit P-15 and ask you if you recognize that? A. Yes, I do.

Q. What is that, Mr. Helman? A. This is the notice to appear for an administrative hearing.

Q. Now, that's dated May 16, 1988. Again, that's kind of in the middle of this operation, isn't it? A. That's correct.

Q. When, approximately, if you know, in reference to when you got the notice, that objection of neighbors, turned down that we talked about before, P-14, when, in conjunction with that, did you get this notice to appear for an administrative hearing? A. A few days afterwards.

Q. Okay. So, this was the next thing that happened in point [153] of time? A. Yes, it is.

Q. And, to where were you directed to appear for this administrative hearing? A. To the Department of L&I, License Issuance Section.

Q. And, with whom did you meet? A. Mr. D'Agostino.

Q. Mr. D'Agostino is in the courtroom? A. Yes, he is.

Q. Mr. D'Agostino also, did he not, personally sign Exhibit P14, the objections of neighbors turn-down? That's close to a signature stamp if you can see that? A. Yes, he did.

Q. Did you appear for your administrative hearing with Mr. D'Agostino? A. Yes, I did.

Q. By the way, do you know what an administrative hearing is and what purpose it's supposed to serve? A. Only generally.

Q. Explain what the basis — what the nature of your understanding is. A. When you're performing some sort of operation without a license, I believe the administration — the administrative hearing is to inform you of what licenses are required and see to it that you apply for them and so forth.

[154] Q. Now, you did, in fact, conduct and have your meeting with Mr. D'Agostino? A. Yes.

Q. There's some handwriting at the bottom of Exhibit P-15, do you know whose handwriting that is? A. Yes, it's Mr. D'Agostino's.

Q. How did it come to be that this handwriting was there? A. I asked him to write an acknowledgment that we had appeared for the administrative hearing.

Q. Can you, if you can, read what it says that Mr. D'Agostino wrote? Just a couple sentences. A. "James Helman appeared at hearing May 26th, 1988. He obtained business privilege, annual amusement and stage show and — I can't make out that word — . . .

Q. Preparing and serving food. A. . . . preparing and serving food license, 5/20/88."

Q. Now, had you, in fact, obtained all of those licenses? A. Yes, I did.

Q. Okay. Continue, please. A. "Parking lot was . . .

Q. Barricaded? A. . . . barricaded." And, the date.

Q. 5/22? A. "Application of dance hall license disapproved 5/20/88. Hearing as scheduled review, 5/3/88."

[155] Q. Does it say 5/31? A. 31/88, I'm sorry.

Q. Okay. Now, why is it that you asked Mr. D'Agostino to write this down? A. I just wanted to make sure that there was going to be no question that After Midnight appeared as requested for the administrative hearing.

Q. In the context of this administrative hearing, did Mr. D'Agostino or anyone else on behalf of the City tell you anything wrong that After Midnight was doing? A. Other than dancing, no.

Q. Did they tell you that there was something that you were doing, aside from dancing, that you should stop doing? A. No.

Q. Did they ask you to correct anything? A. No.

Q. Did they advise you that you were violating any City code or ordinance? A. Other than the Dance Hall Act, no.

MR. FREEMAN: Objection to that because the Dance Hall being a State act, . . .

MR. TRACHTMAN: It's also . . .

MR. FREEMAN: . . . not a City code or ordinance.

MR. TRACHTMAN: It's also memorialized in the City ordinance.

* * *

[163] A. Well, we were concerned, but we weren't particularly worried.

Q. Why was that? A. Because we knew that the board had previously ruled that neighborhood objections was not grounds for denial of the dance hall license. And, we also knew that we had complied with all of the building codes and zoning laws and fire and safety codes and so forth.

Q. Previous to the time that the old After Midnight had filed and pursued its appeal before the board and the board said what, it said as you testified, previous to that time — excuse me — from that time until this time, May 20, 1988, had you learned anything different about what the board did consider, what the board didn't consider, anything along those lines? A. No, I didn't.

Q.Had you received any information from any source that indicated to you that the Board of License & Inspection Review now did consider objections of neighbors? A. No, I didn't.

Q. Did anyone tell you previous to your pursuit of this particular appeal before the Board of License & Inspection Review, did anyone tell you that it would be important for you to bring your supporters, the members of the West Poplar NAC or any of the other people in the neighborhood who supported After Midnight? [164] A. No.

Q. Did you bring supporters to the Board of License & Inspection Review hearing? A. Other than those four or five people we asked to testify for us.

Q. All right. Now, was there a hearing held in May of 1988 before the Board of License & Inspection Review? A. Yes.

Q. Do you remember the date of that hearing? A. Perhaps not exactly, but I think it was around May 31st.

Q. Okay. That's exactly the hearing. Were you in attendance at that time? A. Yes, I was.

Q. Can you describe for the jury, please, what happened when you walked into that hearing room, what did you observe and what happened thereafter? A. Well, I saw a room full of the opponents of After Midnight, which I really didn't expect to see there and a lot of placards and signs opposing After Midnight and some members of the news media and so forth.

Q. Had anyone alerted you to the fact that the news media was going to be there or that the news media had been notified or that . . .

MR. FREEMAN: Objection. There's no proof the news media had been notified.

* * *

[166] you walked in and saw what it is that you saw. A. Well, the board convened the hearing and recognized a third attorney representing some of the opponents and conducted the hearing.

Q. What was the name of that attorney? A. It was Mr. Batoff, I'm not sure of the first name. There's two of them, Jerald or Jeffrey.

Q. Okay. What happened thereafter? A. The board heard testimony.

Q. For how long a period of time did the hearing last? A. I think it was about three hours.

Q. Okay. Did the board take a count or a poll of how many opponents to After Midnight were in the audience? A. Yes, they did.

Q. What did they do? A. Well, actually, they took a count first of the opponents and then of the supporters.

Q. And, how . . . A. And, they asked . . .

Q. . . . did that stack up? A. They asked people to raise their hands.

Q. Okay. How did that stack up in terms of who was for and who was against? A. Naturally, there were more opponents than there were supporters.

[167] Q. And, what did they do thereafter? A. They had

them sign a sign-in register which was submitted to the board.

Q. Had anyone advised you previous to the time that you walked into that board hearing room that the board would take a count of how many people showed up for, as opposed to how many people show up against? A. No.

Q. Had anyone advised you before you walked into that hearing room that the board would literally have people write down their names for, as opposed to against? A. No.

Q. Okay. What happened at the end of the hearing? A. The board denied our appeal.

Q. All right. Now, let me show you a couple of exhibits that relate to that if I might. The first exhibit, P-17, do you recognize P-17, Mr. Helman? A. Yes, I do.

Q. What is the date of Exhibit P-17? A. If I can find it.

Q. At the top. A. June 2nd, 1988.

Q. And, that was a couple of days after the board hearing itself? A. That's correct.

[168] Q. And, you got this notice in the mail? A. Yes.

Q. And, this notice simply said that the City was affirmed in its denial of the dance hall license? A. That's correct.

Q. All right. Now, at hearing itself on May 31, 1988, was a decision and reasons for the decision announced by the board right there in your presence? A. Yes.

Q. Mr. Helman, I'm going to show you an exhibit which has been marked P-18 which I represent to you, and as Mr. Freeman knows, is a page — actually the next to the last page of the trancript — the court reporter's transcript of the hearing of May 31, 1988, wherein the chairman of the board announces the decision and the reason therefore. Have you seen this before? A. Yes.

Q. Okay. And, you've had an opportunity to review that previous to this time? A. Yes.

Q. All right. Now, does that basically represent your recollection of what the chairman said? A. Basically, yes.

Q. Okay. I want to ask you some questions with respect to a couple of the sentences with regard to this. Beginning on the middle of the page, the chairman of the Board of License & [169] Inspection Review speaking, it says, "Let me just say briefly that the board has found that on the dance hall license application there is a responsibility not only inside the premises of the dance hall, which the dance hall appears to be faithfully discharging, but also on the outside to the outside community and that responsibility is not discharged once the individuals leave the premises." Do you remember Mr. Kessler saying those things to you at the conclusion of the hearing? A. I remember Mr. Kessler saying, roughly that. I recall it differently from the way the transcript shows it, but . . .

Q. What do you recall? A. I recall that Mr. Kessler said that After Midnight had a responsibility for the conduct of its customers coming to and from the club.

Q. Did every — anyone ever explain to you during the course of this hearing what it was that they proposed that After Midnight do in order to regulate its customers before they got to the club or after they left the club? A. No.

Q. Did anyone say anything to you specifically, we want you to do this or we want you to do that? A. No.

Q. Did anyone talk to you about the previous offer that you had made with respect to paying the City of Philadelphia for extra police? [170] A. No.

Q. The next sentence says, "We have found that the neighborhood testimony was unanimous, unwavering, and we are persuaded by the problems that seem to have arisen since the dance hall began in operation in May." With respect to this neighborhood testimony, which was unanimous and unwavering, had you, in fact, discussed with your supporters previous to this hearing whether or not you wanted them there? A. Yes.

Q. What did you tell them? A. Well, it's what they told me. They wanted to come.

Q. And, did you dissuade them? A. Yes, I did.

Q. What did you tell them? A. I told them that I didn't want to make a circus out the hearing.

Q. Did anyone, during the course of this hearing, advise you that After Midnight had violated any law except for dancing without a dance hall license? A. No.

Q. Did anyone, during the course of this hearing, tell you that you failed to satisfy any code or any ordinance or any provision of any City code or ordinance or statute or anything else, except dancing without a dance hall license? A. No.

* * *

[179] Q. Did she say that in the presence and in front of the City officials? A. Yes, she did.

Q. During June, did you stop dancing at After Midnight? A. Yes, we did.

Q. Did you do that the first week of June? A. We did that immediately upon being turned down for our license by the Board of Review.

Q. Did you attempt to operate without permitting people to dance on the 12,000 square foot dance floor during June? A. Several times.

Q. What did you try to do? A. We tried to have a show, live stage entertainment and we tried roller-skating.

Q. What happened? A. Both failed because we could not allow the customers to dance.

Q. How did you go about the business of notifying the customers that they were not allowed to dance? A. We put a sign on the door that said that the City of Philadelphia will not allow dancing at this facility.

Q. Would you describe for the jury the nature of the events what you tried to put on and the extent to which they succeeded or failed in June and July? A. Well, the last week of June of every year is black music [180] month. And, the Black Music Association, Philadelphia's Chapter, asked After Midnight if they could hold a benefit concert at After Midnight. And, of course, we said yes, even though we knew that no dancing would be a serious problem. That concert was held on June 30th of 1988 and was very, very poorly attended. Although a great many customers came to After Midnight, when told that they would not be able to dance, they did not pay to come into the facility.

Q. During the course of this time, in June of 1988, did City inspectors also show up at After Midnight? A. Yes.

Q. For what purpose? A. To see if we were allowing dancing.

Q. Did they come — if you'll pardon the expression — after midnight? A. Yes.

Q. Did they walk around to verify among your patrons as to who was dancing and who was not? A. They didn't speak to the patrons directly, but they did walk through the club and observe what was going on.

Q. Did they ever define for you what dancing was? I mean, is that dancing, or did you have to lift up one fott to dance, or what was dancing and what wasn't dancing? A. No, they didn't.

Q. Did they write reports?

* * *

[187] of 1988?

A. Yes, we did.

Q. So, this was actually then the third application; the one in February that was refused, the one that was denied and now this one in November? A. That's correct.

Q. Did the Department of Licenses & Inspections rule upon After Midnight's application for a dance hall license filed in November of 1988? A. Yes, they did.

Q. Let me show you Exhibit P-22 and ask you if you recognize that? A. Yes, I do. It's the disapproval of the application.

Q. Is it your testimony that L&I disapproved once again your application for a dance hall license? A. Yes.

Q. That has some specific language in it with regard to the disapproval. And, perhaps to save you the trouble, if I could read it so I could ask you a question about it. It has the box checked on the printed part where it says police disapproval, and then typewritten in it says, "Based on the opposition of various community groups, business persons and nearby residents (within a two-block radius) along with the fact that the anticipated large crowds would pose a problem for the neighborhood and to the police department's ability to deliver [188] protective services to the entire community." Did I, as far as you can tell, read that correct? A. Yes.

Q. In conjunction with this, did anyone explain to you that you were violating any law by operating as a dance hall except dancing without a dance hall license? A. No.

Q. Anyone point out to you any failure to satisfy a code or ordinance or statute except for the Dance Hall Act? A. No.

Q. Anyone ask you to stop doing anything you were doing except dancing? A. No.

Q. They weren't asking you to do anything more than what you were doing? A. No.

Q. Now, this makes reference this business about posing a problem for the neighborhood and the police department's ability to deliver protective services to the entire community. previous to this time, you testified about one instance in February of 1988 when you offered to pay the City of Philadelphia for extra police persons. Did there come a time thereafter where you made the same offer to the City of Philadelphia? A. Yes, I made it in the same meeting toward the end of June [189] with Deputy Commissioner Mosley and Captain Barcliff.

Q. That was the meeting with the various — the meeting with the greater number of people in it. A. That's — that's correct.

Q. And, at that meeting, what did you offer? A. The exact same thing. I offered — if the City of Philadelphia would assign police officers to the area of 10th and Spring Garden in uniform and on duty on a voluntary basis, after Midnight would reimburse the City for their expenses.

Q. How did the City, if the City at all did, respond to your offer to pay foor the extra police that the City said it needed? A. They thought such a thing could never be done.

MR. FREEMAN: Objection to they. Who is he talking about?

MR. TRACHTMAN: People at the meeting.

Q. Is that who you were referring . . . A. Deputy Commissioner Mosley to be precise.

Q. Deputy Commissioner of the Department of Licenses & inspections? A. Yes.

Q. Did anyone ever follow up with you further with respect to whether you were serious, how much money would you be willing to pay, anything like that? A. No.

Q. Did you file an appeal with regard to the City's November [190] 29, 1988 denial of the dance hall license? A. Yes, we did.

Q. I show you Exhibit P-23, is that the appeal form that you filed? A. Yes, it is.

Q. Subsequent to your filing the appeal form, was there a hearing conducted before the Board of License & Inspection review? A. Yes, there was.

Q. Approximately when did that hearing take place? A. It took place over a course of three separate days toward the end of November and early December of 1988.

Q. This time you knew that you could bring your supporters to the hearing, didn't you? A. That's correct.

Q. And, did you, in fact, bring your supporters to the hearing? A. Yes, we did.

Q. About how many of them did you bring? A. Well, the attendance was different on three different days, but I would say it was between 50 and 80 supporters each day.

Q. At the conclusion of the hearing this time with your supporters there before the Board of License & Inspection review, what happened? A. The board upheld our appeal and we were granted — or [191] ordered the Department of L&I to grant us a dance hall license.

Q. I show you Exhibit P-24 and ask you if you can identify it? A. Yes, this is the letter from the Board of Review granting us our appeal.

Q. And, the date? A. December 14th, 1988.

MR. FREEMAN: I'm sorry, what's P-24, the letter granting the appeal issuing the license or . . .

MR. TRACHTMAN: Correct.

MR. FREEMAN: Okay. Thank you.

Q. Now, I take it from your prior testimony that there was evidence presented at the May 31, 1988 first hearing before the board, there was testimony? A. Yes.

Q. And, was there also testimony and evidence advanced before the board in mid-December of 1988 at the next hearing before the board which resulted in your getting the license? A. Yes.

Q. And, in the — on the occasion of both hearings, was the nature and operations and compliance with law of After

Midnight brought forth before the board? A. Yes.

Q. Were there any differrences that you can tell us about between After Midnight on the occasion of the first board hearing when you didn't get your license and After Midnight on [192] the occasion of the second board hearing when you did get your license? What differences, if any, in After Midnight or the situation? A. There was no real difference in After Midnight's situation between May and December of 1988.

Q. Did After Midnight now with its dance hall license reopen for dancing? A. Yes.

Q. When? A. On December 23rd, 1988.

Q. What happened? A. We — we did business.

Q. How successfully? A. Not nearly as successful as we were in May of 1988.

Q. Would you describe for the jury what happened over the course of the next two or three months with respect to the operations of After Midnight? A. Well, by the time December of 1988 came about, After Midnight had already incurred a huge debt; back rent to the landlord, creditors that were involved in the construction of After Midnight wanting their money, legal fees, expenses to maintain the building. The building had to be kept in a clean state and needed security provided for it and so forth and so on. And, by the time we were actually granted the dance hall License, the financial posture of After Midnight was nothing [193] short of hopeless. And, it would have taken a miracle for us to recover to the point that we were operating in in May of 1988.

We did make the best effort we could, but the money was pretty much gone. We could not maintain the kind of heavy advertising schedule that After Midnight always maintained. We could not add new features; new lighting features and new stage equipment and so forth that After Midnight was noted for. We could not construct the restaurant that we had planned to construct in September of 1988. We were pretty much — we were pretty much down by December of 1988, if not out. There was no adequate money left to schedule artists for live entertainment. Major artists have to be scheduled three and four months in advance. It's necessary to put up substantial deposits and the time of contracting with these artists and the money just wasn't there to do it. We did the best that we could under the Circumstances, but the eight month interruption that was enforced upon After Midnight really hurt us financially.

Q. What's the primary season for a nightclub like After Midnight? A. The main — the most profitable months of After Midnight based on the old After Midnight's experience were the months of September, October, November and December.

Q. What eventually happened with respect to After Midnight? A. After Midnight was in arrears on its back rent during the [194] period of time that it had been closed. And, Good Times Cafe, the lease holder had filed for bankruptcy.

Q. Okay. Now, this bankruptcy filing, did that take place even before the board . . . A. That took place . . .

Q. Excuse me? A. That took place in September . . .

Q. Okay. A. . . . of 1988. Q. And, that's two months before you got your dance hall license — three months before you got your . . . A. It's . . .

Q. . . . dance hall license? A. It's three months before we got the dance hall license.

Q. And, was Good Times Cafe the entity that held the lease in bankruptcy at the time that you got your dance hall license as well? A. Yes.

Q. Continue with what happened. A. We were in arrears for our — I believe it was September, October, November and December rent by the time we had been granted our dance hall license. And, that was a substantial amount of money. The Bankruptcy Court had given to the landlord an order requiring After Midnight to make monthly payments on the rent that was in arrears. Although After Midnight was [195] financially able to pay its current rent, it could not pay both the rent that was current and the rent that was in arrears. And, in April of 1989, the landlord exercised that Bankruptcy Court order and took possession of the building and After Midnight was out of business.

Q. Was After Midnight able to recoup for the people who invested the money in it, any of the investment? A. None at all.

Q. Was it able to make any profits? A. No.

Q. Was it able to do anything with the property that it had bought and all of the things that it did inside the building and the dance floor and the renovations and all of that kind of stuff? A. No, we lost it all.

Q. Did After Midnight keep financial records? A. Yes.

Q. Could you describe the financial records — by the way, were you the person who was responsible to keep them? A. I made the daily accounting sheets, the same system that we used at the old After Midnight.

Q. Okay. And, did you personally see to it that those Financial records were kept? A. Yes.

Q. And, were they kept accurately?

* * *

[197] Welch and Mr. Singer and Mr. Heidinger, could purchase Glitters, which they did, converted it into an after-hours format and opened it for business.

Q. Okay. Let's back up a second. This was a preexisting building that had previously operated as a night club? A. Yes.

Q. All right. And, it was on — in the area of 4th and South Streets on South Street in Philadelphia? A. 427 South Street.

Q. And, it was called — used to be called Glitters? A. That's correct.

Q. What was the state of Glitters at the time that you first became interested in this? A. I think it was closed at the time.

Q. All right. Now, was there agreement reached whereby certain investors — and you mentioned Mr. Singer, Mr. Heidinger, Mr. Welch — anybody else? A. My sister.

Q. And, your sister. Was there an agreement reached which set forth the arrangement to buy Glitters from the owner of the club? A. Yes.

Q. Approximately when did that take place? A. I think the agreement was around May, or possibly June of 1988.

* * *

[202] Q. Thank you. And, did Down South get a response from the City of Philadelphia? A. Well, not actually on our renewal we didn't get a response.

Q. Let me show you Exhibit P-29 and ask you if that's the response that you got? A. Yes, this is the response.

Q. And, that's signed by whom? A. Mr. D'Agostino.

Q. That's an original signature this time, not a signature stamp, isn't it? A. Yes.

Q. What's the date of P-29? It's October . . . A. October 14th, 1988.

Q. Now, before we get into what it says, up at the top where it has those boxes that say new or renewal, which one is checked this time? A. Now the new one is checked.

Q. And, what's the response in terms of whether the application was approved or disapproved? A. It was disapproved.

Q. And, what three words are set forth, typewritten, for the basis of the disapproval. A. Objection of neighbors.

Q. Did you file an appeal? A. Yes, we did.

[203] Q. To the Board of License & Inspection Review? A. Yes

Q. I show you Exhibit P-30 and I ask you if this is the appeal form? A. Yes, it is.

Q. And, what's the date, November 10? A. November 10th, 1988.

Q. Now, at or around this time, was Down South being inspected by City inspectors? A. Yes.

Q. Did there come a time when you had occasion to speak with Mr. D'Agostino with regard to matters pertaining to Down South and the various inspections that were made of it? A. Yes.

Q. Can you relate your conversations with Mr. D'Agostino? A. Well, Mr. D'Agostino informed us that the City was going to have to close Down South.

Q. Where did this meeting take place? A. In the Municipal Services Building.

Q. What is it that caused you to be there? A. I don't really recall what — what caused us to go there, but for some reason, Mr. Welch and I were there. And, Mr. D'Agostino asked us to step into his office and he told us that Down South was going to have to close that very night.

Q. That very night? [204] A. This was a Friday, and he told us were going to have to close that very night.

Q. What sort of business was Down South conducting at this time? A. It was an after-hours club in a rap format.

Q. When had Down South first opened up? A. It was around July 10th of 1988.

Q. And, what format did Down South have at that time? A. We tried an over-21 after-hours format. We — Down South had a liquor license and the liquor license was purchased at the same time that Glitters was purchased. But, some period of time was going to have to transpire while the liquor license was transferred to the new owners. In the meantime, in order that we didn't have a building sitting vacant, we opened Down South as an after-hours club, bring your own bottle type club for an over-21 crowd.

Q. Was Down South successful in that format? A. No, it was not.

Q. Did the City of Philadelphia or the Department of Licenses & Inspec — by the way, did you permit dancing at Down South in this format? A. Yes, we did.

Q. Did the Department of Licenses & Inspections or the City of Philadelphia give you any trouble at all with respect to the fact that you were permitting dancing there? [205] A. No.

Q. Did Down South change its format at some point? A. Yes, it did.

Q. And, it changed to what? A. To a rap format.

Q. What happened thereafter in terms of Down South's popularity? A. Almost instantly successful.

Q. Approximately when did that happen? A. Probably around July 20th, 1988.

Q. Why did you decide to change to a rap format? A. Because the over 21 format just wasn't working.

Q. Were you engaged in your problems that you previously described with After Midnight at this time? A. Yes.

Q. Were you looking for a place for your customers? A. Desperately.

Q. Okay. Then you went into the situation with respect to the renewal going to the new and the dance hall denial that we went into before? A. That's correct.

Q. Okay. Now, with that backdrop, you're at your meeting with Mr. D'Agostino in the Municipal Services Building which is approximately when? A. October 7th, 1988.

[206] Q. And, previous to that time, did Down South continue to operate in the rap format? A. Yes, it operated in the rap format for ten weeks.

Q. And, was — did it continue to be successful? A. Very successful.

Q. Can you quantify somehow for the jury that — the financial success of Down South during this time? A. 450 to 600 customers each Friday and Saturday night.

Q. And, what about in terms of dollars and cents? A. Gross receipts of $78,000 in ten weeks.

Q. And, what proportion of that was profit? A. About $5,000 a week.

Q. All right. We're on October 7, 1988 and you had your meeting with Mr. D'Agostino. What did he say to you? A. That After Midnight (sic) was going to have to close that very night.

Q. And, did he tell you why? A. Yes.

Q. What did he say? A. He said we were violating the fire code because we did not have a lawful occupancy sign.

Q. Had you received any prior notice with respect to any such thing? A. No, we did not.

Q. Did he give you any papers?

* * *

[211] attached to the sprinkler — it's actually a part of the sprinkler system. But, for some reason or other when the sprinkler system was installed in the building that Down South was located in, even though it was a City-approved sprinkler system, it did not have the standpipe. This sprinkler system was there and it was properly rated, but the standpipe was not there.

Q. And, what about the other requirement, access for the handicapped . . . A. Access . . .

Q. . . .to this dance hall? A. Access for the handicapped, yes.

Q. Do you know whether they imposed these requirements on Glitters, your predecessor, at the same building? A. Well, they must not have because there was no standpipe and there was no access facilities for the handicapped.

Q. What happened with Down South? A. Well, it went out of business financially before were were able to comply with the City's standpipe and handicapped facilities request.

Q. From October 7, 1988, the time that the City put that orange cease operations sticker on the front door of Down South, did Down South ever get back in business? A. No.

Q. And, what was the reason for that? [212] A. It cost too much money to install the standpipe and the handicapped facilities that the City wanted us to install.

Q. Mr. Helman, throughtout . . . A. And, plus we weren't con — we weren't allowed to continue operating while we did that. We had to do that and then reopen.

Q. Throughout all of this — and when I say all of this, I mean all of the events that you've described with respect to After Midnight and all of the events that you've described with respect to Down South beginning in the summer of 1987 through the spring of 1990, were you ever able to sit down with an official of the City of Philadelphia and ask him or her why is this happening to us or why are you doing these things to us? A. No.

MR. TRACHTMAN: I don't have any other questions, Mr. Helman. Thank you.

THE COURT: Let's take our mid-afternoon break, members of the jury, ten minutes. Please don't discuss the case among yourselves. You can leave your notes face down on your seats and retire to your jury room. You may step down, sir.

MR. HELMAN: Thank you, sir.

(Recess from 3:10 p.m. until 3:40 p.m.).

THE COURT: Sorry. You may come back up on the stand, sir.

(Jury enters.)

D'Agostino — Direct

[95] 34, which is a copy of the Dance Hall Act. And for your convenience, I've put it together so that there's one section of the action per page. Do you see that? A. Yes, sir.

Q. And does that appear to be the Dance Hall Act to you, from what you can tell? A. Yes, sir.

Q. Okay, And I may be referring you to that on occasion and, therefore, if you would keep that in a handy spot that would be helpful. Let me ask you some questions regarding the procedures that applied in the 1988 in the issuance of dance hall licenses in the City of Philadelphia. Okay. A. Yes, sir.

Q. The first topic that I want you to address with me, in the 1988 when you were permitted to apply, to just even go up and file the application and get it procesed at the Department of License Issuance. It's my understanding, and you tell me if I'm wrong, Mr. D'Agostino, that in 1988 the Department of

Licenses and Inspections would not take the dance hall license application unless you had a certificate of occupancy? A. That's correct.

Q. And it's also my understanding that in order to get a certificate of occupancy, one would have to complete the construction involved in the dance hall and have passed the inspections that go along with that.

* * *

[96] A. That's correct.

Q. It's also my understanding, Mr. D'Agostino, that this was not a policy that was in writing anywhere in the City of Philadelphia, but rather it was just the policy at the time at the Department of Licenses and Inspections, is that so? A. It was the policy when I was appointed to that section, that's correct.

Q. Understood. And it remained the policy through 1988, the period that we're referring to, did it not? A. I'm not sure of the exact time.

Q. Well did it ever change during 1988? A. I changed it in 1988.

MR. FREEMAN: Objection, Your Honor. Objection to the question and the answer.

MR. TRACHTMAN: I want to . . .

MR. FREEMAN: Move to strike.

THE COURT: Hold the phone now.

MR. FREEMAN: There's no basis for the question. I move to strike the answer.

MR. TRACHTMAN: Your Honor, for your help — to assist you, all I want to know is what the policy was in 1988. And I would like Mr. D'Agostino to tell me that.

THE COURT: That's a proper question and . . .

MR. FREEMAN: Fine. Then answer that question, Mr. D'Agostino.

[97] THE COURT: . . . I think, therefore . . .

Q. Could you apply — in 1988, could you apply for a dance hall license before you got the certificate of occupancy in 1988? A. I'm not sure what time period it was changed.

MR. TRACHTMAN: Your Honor, I have — Your Honor has made a ruling . . .

THE COURT: Well perhaps there is something you can show him and ask him to look at it and see if it refreshes his recollection.

MR. FREEMAN: Just talking about 1988, Mr. D'Agostino.

MR. TRACTMAN: Maybe perhaps I could . . .

THE COURT: No, just a minute. I'm sure this machine is not picking up all three of us at one time.

MR. TRACHTMAN: Let me maybe do it a simpler way.

THE COURT: Did you get my suggestion?

MR. TRACHTMAN: Yes, sir. And perhaps I can even do it a simpler way. Mr. Freeman, will you stipulate with me that during 1988, an applicant for a dance hall license could not file the application unless he had first received the certificate of occupancy?

MR. FREEMAN: That's what the witness said.

THE COURT: No, he didn't.

MR. TRACHTMAN: No, he did not.

MR. FREEMAN: Yes.

[98] THE COURT: That's what's caused the problem.

MR. FREEMAN: I so stipulated it.

THE COURT: He's not sure of the timing.

MR. TRACHTMAN: Okay.

MR. FREEMAN: We have so agreed, yes.

MR. TRACHTMAN: All right.

Q. Mr. D'Agostino, do you understand that? That counsel and I, reviewing some records, have stipulated that throughout all of 1988, an applicant for a dance hall license could not file for a dance hall license until after the certificate of occupancy was obtained. Okay? A. All right.

THE COURT: Under the policy . . .

MR. TRACHTMAN: Of the Department of Licenses and Inspections.

Q. Now that policy of the Department of Licenses and Inspections that said you couldn't file your dance hall license application until after you completed construction and got the certificate of occupancy, that's not part of the Dance Hall Act, or it's not required by the Dance Hall Act, is it? A. That's correct.

Q. Okay.And it was just your policy notwithstanding the Dance Hall Act, isn't that . . . A. That was the procedure.

Q. Okay. And there was nothing in the Dance Hall Act that [99] required you to do it that way? A. That's correct.

Q. All right. Let me see if I understand and if you agree with me on the consequences — the practical effect of this procedure. If you have a situation where you were building a new structure or renovating a structure to be a dance hall, you could not then file your application until after you spent the money that was necessary to complete the renovation in that situation or the new construction? A. That's correct.

Q. Let me move onto the next topic with respect to the procedures in effect in the City of Philadelphia in 1988 with regard to dance hall licenses. My understanding of the procedure, Mr. D'Agostino, and you again correct me if I'm wrong, is that when the application does come in — the construction has been completed, the certificate of occupancy is obtained, the application does come in. A clerk takes the application and refers the matter to the — for a fire inspection confirmation, for a tax confirmation and to the police, is that right? A. That is correct.

Q. And the referral to the fire inspection, the department of L&I wants the fire inspection people to tell it are there any outstanding fire code violations or anything like that, right? A. That's correct.

* * *

[101] to the Department of Licenses and Inspections whether the police are for it or against it, the policy check to see whether the operators have any criminal records, and the police check in the neighborhood — they do a survey to see whether or not there's neighborhood opposition in the area immediately surrounding the proposed dance hall? A. That's correct.

Q. Okay. Now the next part of this proccedure, as I understand it, is when the police communicate this recommendation to your departmet, your department automatically goes along with it. If everything else is okay and the police say we recommend it, we'll grant the dance hall license if everything else is okay. And the police say we do not recommend it, you will not grant the dance hall license. A. That's correct.

Q. And as a part of that, the Department of Licenses and Inspections does not look to see if the police had good reasons, bad reasons, any reasons, what the resoning was, they just take the recommendation of the police department without analyzing it or looking behind it in any way? A. The State law permits the Mayor to use any department he so desires to conduct investigations.

Q. Ah-hah. And that State law that we're talking about is the Dance Hall Act, is it not? A. That's correct.

* * *

[108] A. I really don't understand it.

Q. All right. And you were the chief of the Department of License Issuance in 1988 as well as now? A. That's correct.

Q. Let me now again see if I understand the consequence of this particular topic that we've been talking about. That is, your automatic acceptance of the police recommendation based upon neighborhood objections. As I understand it, and again would you please correct me if I'm wrong, you could in the case of building a new dance hall or spending a million and a half dollars to renovate an existing structure, you could pass all of those codes and ordinances that are referred to in those two sections. You could get your certificate of occupanccy, but you could still be denied a dance hall license after you build your building because the police found there to be some objection in the neighborhood. Is that your understanding of how it works? A. That's correct.

Q. Do you know whether in any other section of the Dance Hall Act if says that you have to please your neighbors or win any kind of popularity contest among your neighbors in order to get a dance hall license? A. I don't know.

MR. FREEMAN: Objection, Your Honor. He has not been proposed here . . .

THE COURT: It's already been answered.

* * *

[119] MR. TRACHTMAN: I'll be a good boy.

Q. Let me go onto the next part of what I need to talk about about this procedure, Mr. D'Agostino. I've heard twice now in this case, once in counsel's opening statement and once in your comments earlier in my examination, the fact that the Department of Licenses and Inspections wants to make sure that dance halls are safe and proper places, is that right? A. The Department of — yes, that's correct.

Q. And that language comes out of that 1919 statute, two sections of which are sitting next to you, isn't that correct? A. Yes Sir.

Q. Okay. Does the City of Philadelphia have fire and safety codes? A. Yes, they do.

Q. Do you know whether the City of Philadelphia, by the way, had fire and safety codes in 1919? A. I have no knowledge.

Q. Okay. These fire and safety codes, they're all written down, aren't they? A. Yes, they are.

Q. They're in piles of pages and section numbers and all that kind of stuff, right? A. That's correct.

Q. They're very specific as to what specific buildings have to do to meet fire and safety requirements, right? [120]A. That's correct.

Q. And they are prepared by experts, correct? A. That's correct.

Q. And they are updated periodically to make sure that they conform with the latest state-of-the-art with respect to what's safe, isn't that correct? A. That's correct.

Q. And all of this depends upon an analysis of how you're going to use the building and how many people are going to be in the building and that dictates what you do for exits and stairways and sprinkler systems and fire walls and all this kind of stuff, right? A. That's correct.

Q. When After Midnight got its certificate of occupancy, among other things that meant, did it not, that After Midnight satisfied all of those safety code requirements, isn't that right? A. That's correct.

Q. Now is it the position of the Department of Licenses and Inspections that the neighbors in the area that the police might talk to to determine whether or not they want a dance hall or not, is it the position of your department that those neighbors are experts with respect to what would be a safe dance hall? A. Not as to construction.

[121] Q. Okay. So with respect to that, the safety of construction, one does not consult the neighbors in the area to determine whether it's a safely built dance hall, isn't that right? A. That's correct.

Q. Okay. Now does the City of Philadelphia have a zoning code? A. Yes, they do.

Q. The City of Philadelphia changes its zoning code on occasion, updates it, et cetera? A. Yes, they do.

Q. They do studies in the city as to what sorts of uses are best for what parts of the City and what limitations on use and all that kind of stuff? A. Yes, they do.

Q. They do traffic studies and all this kind of thing to determine these things? A. Yes, they do.

Q. And this zoning code is all written down in all sorts of papers, is it not? A. Yes, it is.

Q. And it's very specific as to the kind of things that you can do at particular places, what uses are proper where, isn't that right? [122] A. Yes, it is.

Q. So in determining what is a proper use under the law for a particular location, one would refer to the zoning code, isn't that right? A. That's correct.

Q. And when one such as After Midnight applies for a zoning permit and gets it, that means that the proposed use at that spot is proper under the zoning code, isn't that right? A. That's correct.

Q. Now is it the position of the Department of Licenses and Inspections that the neighbors in the immediate area of the dance hall are experts on the zoning code? A. No.

Q. Is it the position that the neighbors know more than the City planners who wrote the zoning code about what's proper at a particular location? A. The zoning code is quite often changed due to input from the neighbors.

Q. Oh, I'm sure it is. But before it's changed, it speaks for itself and it's either satisifed or it's not, isn't that right? A. That's correct.

Q. And if it's satisfied you get a zoning permit, isn't it? A. That's correct.

Q. And After Midnight got a zoning permit for a dance hall, didn't it? [123]A. Yes, they did.

Q. So we've covered the codes that relate to what's safe and we've covered the codes that relate to what are proper uses. Are there any other codes that relate to safe or proper?

MR. FREEMAN: Well objection, Your Honor. Again it calls on the witness to . . A. I'm not an expert in all the codes.

Q. Okay. But you don't know of any more?

THE COURT: Wait a minute. I have to hear an objection.

MR. FREEMAN: Exactly. The witness made my objection. He's not an expert in all of the codes. I think the question to him is misleading. What's proper is police — the police determintion is obviously established on this record . . .

THE COURT: Well . . .

MR. FREEMAN: . . . and all this questioning is completely redundant and misleading.

THE COURT: . . . the witnes is chief of license issuance as I understand it. I think, therefore, the question is not inappropriate. Overruled.

Q. You've answered my question, Mr. D'Agostino. I won't badger you anymore with respect to that. Let me pose something to you as to these procedures that go into the dance hall license issuance process. Suppose that when the police do this survey there's disagreement among the neighbors. You've got one group of neighbors who says we're for it, and you've got another group of neighbors who says we're against it? Do you have any idea how the police go about choosing which group of neighbors should win? A. I do not.

Q. Do you know whether there's anything written down in the City of Philadelphia that one could refer to if one were interested in building a dance hall that would inform one of what criteria the City would use in deciding which group of neighbors, the ones who say this is the greatest thing in the world and the others who say this is the worst thing in the world, anything written down which would inform one as to how the City goes about choosing which point of view to accept? A. I suggest you ask the police department.

Q. You as the chief of the Department of License Issuance, which is responsible for issuing dance hall licenses, however, I take it are aware of no such thing written down? A. I have not seen anything personally.

Q. And just to encompass all of the questions that I've asked you so far. If one was in the position of applying for a dance hall license, wanted to find out all of these procedures and techniques and all the rest of it that I've discussed with you up to this point in your testimony as to what the police do and your automatic deferral to the police recommendation and how the neighborhood survey is done, all that other stuff we talked

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[135] Q. But it's possible? A. That's correct.

Q. And that's the basis upon which dance hall licenses in the City of Philadelphia are issued? A. Some of the criteria.

Q. Refer further down in the Home Rule Charter. Do you see that paragraph towards the bottom that's underlined? A. Number four?

Q. Under four. A. Yes.

Q. It says, "The requirements and standards to be met by applicants for licenses shall be established by the department in all cases in which the departmet is responsible for the functions involved." Did you ever see that before? A. This paragraph?

Q. Yes. A. Yes, I have.

Q. Can you tell me what requirements and standards to be met by dance hall applicants have been established by the Department of Licenses and Inspections? A. I don't know what happened in 1951 or '52 when the charter was adopted. I was a child.

Q. Mr. D'Agostino, I'm going to keep asking the question until I get an answer. What has the department done, to your knowledge as the chief of the section of license issuance, in [136] order to establish in accordance with the Home Rule Charter the requirements and standards to be met by applicants for dance hall licenses? A. I do not know.

Q. To the best of your knowledge, have any requirements or standards been promulgated and written down by the Department of Licenses and Inspections so that applicants for dance hall licenses could see what criteria they're supposed to meet? A. I do not know.

Q. The only thing that you know about is that Dance Hall Act and that pamphlet, right? A. That's correct.

Q. To the best of your knowledge, Mr. D'Agostino, when an applicant before your section is turned down for a dance hall license, that applicant has a right to appeal to something called the Board of License and Inspection Review, isn't that right? A. That's correct.

Q. To the best of your knowledge, is there anything written down by way of requirements or standards for dance hall licenses that applies to proceedings before the Board of License and Inspection Review? A. I don't know. The Board of L&I reviews policies.

Q. Do you know whether there are any policies that are written down?

* * *

[148] in the City were well aware that After Midnight was under construction and substantial renovation early in 1988, months before this, isn't that so? A. I wasn't personally aware of all

dollar amounts, amount of construction.

Q. I didn't ask you that, Mr. D'Agostino. I asked you whether you were aware of the fact that something called After Midnight was under construction — in the process of being constructed and renovated as early as early 1988, months and months before May 20, 1988? A. I knew it was under renovation.

Q. Okay. You had in fact earlier in 1988, months before even a dance hall license application was permitted to be filed by After Midnight, you knew that people for example in the zoning section of the City were attending meetings with After Midnight's opponents, didn't you? A. I'd heard of that.

Q. Were you aware also of the fact that After Midnight's opponents, months before After Midnight was even permitted to file a dance hall application, they were having private meetings with the City Solicitor's office? A. No, I was not . . .

Q. Did you know that? A. I was not aware of that.

Q. Were you aware of the fact that months before After [149] Midnight was even permitted to file a dance hall license application, the opponents were having meetings with the City Councilman, Councilman Tayoun? A. I was really not aware of that.

Q. But you were at least aware that some people, and Mr. Pugliese (phonetic) to be specific, your friend in zoning, he was meeting — he at least had met in early 1988 with the opponents of After Midnight? A. He had mentioned that he attended a community meeting. Not the opponents, it was a community meeting I think of old people.

Q. Do you know whether throughout early 1988, late 1987 for that matter, before After Midnight was permitted to file for its dance hall application, do you know whether anybody, either from your section or otherwise on behalf of the city, communicated with anybody on behalf of After Midnight and said something to the effect of hey, listen, you guys may not know this because it's not specifically written down, but there's neighborhood objections and we consider this neighborhood objection stuff pretty seriously here at the Department of L&I and maybe you guys want to rethink what you're doing? Anybody from the City ever communicate that to anybody on behalf of After Midnight? A. I discussed that with Mr. Helman, but that was a later time.

[150] Q. That was after the application was already turned down, right? A. I believe it might have been after . . .

Q. Yes. A. . . . or when it was still pending. I'm not sure of the exact timing.

Q. But during the course of all this construction, whatever meetings were going on in early '88 between Mr. Pugliese and the opponent community meetings, whatever else was happening, you're not aware of any such notice or word going out from the City to After Midnight to let them know what might happen here, is that right? A. I didn't know of anything.

Q. After the turn down by the Department of Licenses and Inspections on May 20, 1988, but before the Board of License and Inspection Review ruled, there's a couple week period, isn't that right? There's an eleven day period to be specific. A. Yes, I believe so.

Q. So at that time, here's the status quo, and you tell me if you agree. After Midnight is open, it does not have a dance hall license, right? A. That's correct.

Q. It has safisfied all City codes and ordinances and has a certificate of occupancy, right? A. Everything but the Dance Hall Act is satisfied.

* * *

[175] inspection of the above location indicates compliance with violations of the Philadelphia code. Please approve is checked off. Dance hall is checked off. License for this location.

Q. Now let's interpret what this form is. First of all, to get ourselves in an appropriate chronology, this is dated January 19, 1988, right? A. That's correct.

Q. And this is a memo from the chief of a section that does the fire code inspections and that kind of stuff, right? A. Yes. It's a standard form.

Q. Okay. It's a form — it's a memo from the guy who does the fire code inspections to you, the chief of the license issuance section, and it says that Glitters is in compliance with all sections of the Philadelphia fire and safety code and can be and can have a dance hall license as far as they're concerned. A. It says in compliance with the fire code.

Q. Okay. And that's in January of 1988? A. That's correct.

Q. So as of that time, so far as the City's records would indicate, the structure at Fourth and South Street, then Glitters which later became Down South, everything was okay with that structure as of Janury, 1988 so far as the fire code was concerned? A. That's correct.

Q. Now do you recall seeing records — I'm not suggesting that

* * *

[181] A. Neighbors, media.

Q. Mainly media, wasn't it? A. I recall the South Street Star in particular.

(Discussion off record.)

Q. As soon as the media got involved, your department had a policy that the commissioner had to be notified with respect to matters which were being focused on media attention? A. That was standard procedure. It still is.

Q. Now that exhibit that we talked about before, P-29. That said neighborhood objections again. To read it exactly it says, "Police disapproval, objection of neighbors". And that's the only explanation that's given for the denial of the dance hall license at Down South, isn't it? A. That's correct.

Q. And that's the one that was personally signed and I assume reviewed by you for correctness and everything else, right? Right? A. Yes.

Q. And can I assume also that you had no idea how many neighbors were interviewed, what they were asked, whether or not the reasons for their objections were valid or invalid, but rather you accepted the police recommendation as you did in accordance with the standard procedure you explained before? A. I probably reviewed the police report.

Q. But you had no idea what the police did, how they did it,

* * *

[191] minor. Any of the violations of Down South that is. Answer, I recall that." You said that to the newspaper and it was published in the newspapers, didn't you? A. That information was probably given to me from someone to make that statement.

Q. Is that another speculation, Mr. D'Agostino? A. No. I would not make a determination on fire code violation. Someone would have to inform me that they were minor and I would inform someone else that they were minor.

Q. Somebody more expert . . . A. When we say minor, we mean relatively easy to correct.

Q. Okay. A. All fire code violations are serious.

Q. Well I understand, but you do admit that perhaps as a result of someone more knowledgeable than you in the fire code area, you were willing to state at the time that those charged fire code violations were minor? A. Because I was probably delegated to talk to the press.

Q. Okay. I'm not saying you did something wrong here, Mr. D'Agostino. I just . . . A. No, I'm just explaining it to you.

Q. . . . need to — . . . A. I didn't do anything wrong.

Q. . . . that need to establish that you did in fact say that and . . . A. That's correct.

* * *

Kessler — Direct

[210] else that the Board had written down which defined the type or nature of neighborhood objections it considered? A. The number of hearings that the Board holds on dance hall licenses, all of which are transcribed and available on request. In addition, the appeals that have been taken, although I can't cite any off the top of my head, from our decisions on dance hall applications that have been appealed to the Court of Common Pleas of the City of Philadelphia. If the City has rendered — or the court has rendered an opinion on dance hall, it would be reflected in both of those as well.

Q. Aside from that, is there anything that the Board publishes by way of guidelines or criteria which notifies applicants as to the type or nature of neighborhood objections that the Board considers? A. The Board does not publish — does not publish criteria.

Q. Okay. Now with regard to the one comment you just made about the decisions of the Board, and there's a court reporter there and the like, isn't it a fact that the Board does not always announce the reason for its decision or what it relied upon or what it didn't rely upon at the close of testimony or at the close of the hearing? A. The Board does not always announce the reasons for its decision. However, if counsel for either side presses the Board as to those reasons, the Board freely gives those reasons.

* * *

Kessler — Redirect

[241] it.

Q. You did or did not say it was important?

THE COURT: He did not say . . .

Q. Okay. Let . . .

THE COURT: . . . it was important.

Q. Do you recall having your deposition taken in this case, Mr. Kessler? A. Yes, I do.

Q. And that was on June 13, 1990, you gave truthful testimony . . .

THE COURT: Ask him first if he didn't say something different and try to . . .

Q. Do you remember whether you told me something different as to whether or not this was important at the time? A. What was — that people write their name down on a list?

Q. Yes, the poll — the poll that you take as to how many are for and how many are against. A. Oh, no, no. You're asking me a different question now. Do I consider that there are 80 people in the audience that are opposed to something and that there are five or six or seven that are in favor of it important? Yes. Let me restate so that the record is clear then that is a — that's a factor.

Q. Okay. A. But let me just say this. The importance that we attach to it is then dependent upon the type of testimony we hear from [242] those residents. The people come in and say we just don't want dancing in our neighborhood, we don't like dancing, we're against dancing, and there are 80 people that are opposed to it, we may not consider that to be important. But if the reasons for their opposition are significant reasons, then we may consider it to be important.

Q. Now with respect to this show of people, not all of whom can testify but they arrive at the hearing room and there's 50 or 60 or 70 of them and all of that kind of stuff and you consider that — however it is that you explain you consider that. Is there — focusing upon someone who has never been through this kind of procedure before and only has the Dance Hall Act to refer to, is there some way that someone would know that the Board actually considers this kind of show of community support or opposition important? A. Yes, there is, counsel. As I've already indicated, you can to the reported decisions, and there probably are not that many. The Board does not have the resources to have everyone of its decisions — every one of its hearings reflected immediately in a reported decision. All of our hearings are transcribed by a court reporter. There's a court reporter there. If any appellant, if anybody said to that court reporter I'd like the notes from that hearing. I'll pay you for those notes, or I'd like the notes from a number of hearings, the court reporter will make those available. A person — a [243] member from the public is perfectly allowed, as I've already testified, to go to the Board records and review the Board records. More importantly I think, any member of the public is free to come to our Board hearings. And I already testified, I can think of one in the last couple of months who sat through any number of our hearings to get the feel, the flavor and see the way the Board deliberates and that's how I'd answer that question.

Q. Okay. Now just to start at point one, you wouldn't certainly find that out by looking at the Dance Hall Act that you consider the show of neighbors to be important? A. It's . . .

THE COURT: Counsel, aren't we going to beat a dead horse here?

MR. TRACHTMAN: Well I'm sorry, Your Honor. I'll take that . . .

THE COURT: Let's give us credit for having some common sense . . .

MR. TRACHTMAN: Okay.

THE COURT: . . . and not ask questions like that.

MR. TRACHTMAN: Okay.

Q. You talk about looking at the transcripts and finding out what the Board does by getting the transcripts of notes of the testimony and looking at the files. Do you remember me asking you questions about what one would find if one were to do that [244] at your deposition, Mr. Kessler? A. No, I don't remember.

Q. Well let me refer you to pages 55 and 56 of your deposition, if I might, where I asked you the following questions and you gave me the following answers. The question was, addressed by me to you., "Do you not know whether by obtaining the transcript of a hearing and all of the City's records with respect to a particular dance hall application proceeding before the Board, if one were to do that, obtain the City's entire file on a particular applicant and obtain the transcript of the notes of testimony which took place with respect to the applicant, one would be able to determine what went on and the basis on which the Board ruled? Your answer was, I don't know. Question, with respect to the matters on which you sat in 1988 as chairman, if one were to obtain the file . . ." You interrupted me and said, "My answer is based upon cases on which I sat. Obviously I can't testify on matters that came up before I was on the Board. My question was, well I'm just a little curious as to why with respect to those matters you wouldn't know if the matters that you were involved in would disclose the reasons why the Board ruled. Answer, I'm not saying yes and I'm not saying no. I'm telling you you'd have to go to each individual case. I don't know." A. Okay. Let me — let me now, having had my recollection refreshed a little by looking at the actual files that Mr. [245] Freeman showed me a few minutes ago, which I don't believe I had before me at the time you asked those questions, say that based upon the two files that Mr. Freeman showed me I see in those files lists of neighborhood's objections. Those who were in favor, those who were against — opposed. Those are in the files. I also saw, Mr. Freeman just showed me, which I didn't remember until he just showed me, and bear with us, we hear about 600 to 700 appeals a year, a letter from — I don't remember who it was from, the owner proposing to take a number of different measures to address neighborhood concerns and there are other things, excuse me, that are also in those files that would probably — including our voting sheets. And on my voting sheet, as Mr. Freeman just showed me I made some notes, that if someone looked at those files — at least in these cases and I just can't remember every case, but in these two cases I think you'd get a pretty good idea of the kinds of things that we considered and felt were important in the case.

Q. These two cases were somewhat unusual, can we agree? A. In terms of the records?

Q. Well . . . A. No. I have a vote sheet in every case and every dance hall license case, as I just testified to, we take attend — I mean those who are in favor, those who are against. In every single case I guess, Mr. Freeman just showed me the police report. If the police report is in there, it's going to show that the [246] police conducted an investigation and what their investigation showed. It's certainly different in many respects, but not in those respects.

Q. Mr. Kessler, your vote sheet has two lines on it. It says City affirmed or City reversed and it has a little blank where you make a check mark, does it not? A. Yes, it does.

Q. Do you . . . A. That's right.

Q. Do you as a regular course in checking City affirmed or City reversed, also take the trouble to write down on your vote sheets the logic behind your decision and what you considered and what you didn't? A. Counsel, I must say there's no common course of conduct. Sometimes I do — many times I do, sometimes I don't, but I also . . .

Q. What about . . .

THE COURT: That's enough. You've answered the question.

Q. What about the other members of the Board. Do you know what they do in terms of explaining their votes? A. Some take notes, some don't. I don't know.

Q. Now isn't it true that at the end of the hearing sometimes you announce the reasoning for your decision and sometimes you don't announce the reasoning for your decision? [247] A. I think — the answer is yes, but in cases where counsel gets up . . .

THE COURT: No, you've answered the question.

MR. KESSLER: Well, Your Honor, I'd just like . . .

THE COURT: No, just answer the question put to you.

Q. Isn't it true also, Mr. Kessler, that the only cases in which any of this — what you say at a hearing gets transcribed are those cases in which an appeal is filed? A. As of right, yes.

Q. Okay. So we'd be limited to — in terms of searching the Board files, we'd be limited to finding those cases in which an appeal was filed, in which the notes were transcribed and it would have to be a case in which it was one of those where you expressed what the reasoning was for the decision. If we found those cases, we'd find what the Board considered and what the Board didn't? A. The answer is no to the extent that it's not only those cases. As I have already testified to, every single Board hearing is transcribed. And if counsel or somebody unrepresented asks for a copy of a transcript that wasn't already transcribed, it could be transcribed.

Q. All right. So I'm an applicant for a dance hall license. I'm curious as to what it is that's going to happend to me if I end up before the Board. And I think your testimony is what I would have to do is I would have to appear at the Board, I [248] would have to search through the Board's files. I would have to either obtain transcripts that . . .

THE COURT: I see no point to be served in your recounting the testimony . . .

MR. TRACHTMAN: Well . . .

THE COURT: . . . and I suggest we move along to another point.

MR. TRACHTMAN: I think the point is made.

Q. With respect to your testimony about the crowd of people that showed up in December, I think you said that that tipped the balance to show that these people who were supporters showed up at that hearing and that tipped the balance in terms of the Board's reasoning. Was that your testimony as I recall? A. No, it wasn't.

Q. Well we'll leave it to the jury. If 50 or 60 people had showed up at the first hearing for purposes of showing their vociferous support in explaining to you all of the things that After Midnight had done to accommodate them, would that have been important for the Board to consider in May of 1988? A. I think that would have been important, yes.

Q. Okay. Aside from the testimony that you've already given to me, is there anything else that you can point to that would have instructed my clients as to the importance of that to you? A. Important — I'm sorry, importance of what to me?

Q. Never mind, I'll withdraw the question. Mr. Freeman asked

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D'Agostino — Redirect

[270] A. Changes?

Q. Changes. A. Yes, we'll accept an application.

Q. Well you'll accept an application when? A. Prior to the statement of occupancy being issued.

Q. So now you've made changes so that an applicant doesn't have to wait until after the building is built or renovated to file his application, isn't that right? A. That's correct.

MR. TRACHTMAN: No other questions.

A. And if someone had come to me — if Mr. Welch had come to me in 1987, I would have done the same thing for him.

Q. Thanks, Mr. D'Agostino.

MR. FREEMAN: Thank you. No other questions.

THE COURT: That's all, sir. Thank you. You may step down.

MR. D'AGOSTINO: Thank you.

THE COURT: Your next witness.

MR. TRACHTMAN: The plaintiff calls Nadirah Williams to the stand.

MS. LAFLIN: Excuse me, just a second.

MR. FREEMAN: We have people you asked to have here.

MR. TRACHTMAN: I can't — I mean I wasn't counting on Kessler, but people have to go to work tomorrow and can only be here today.

* * *

Tayoun — Direct

[298] Q. That what you say to your constituents has to come true. A. I was elected. I did not have to justify getting votes.

THE COURT: No. Just answer his question. Answer the question he put to you.

MR. TAYOUN: Well I — okay.

Q. Your credibility is important to you with your constituents? A. Yes.

Q. Now on this note that came out of your office, "The bottom line is that they will not get this license". Did you by any chance in the effort to preserve your credibility with your constituency do anything to make sure that your prediction would come true.? A. No need. .

Q. You knew in January that After Midnight would not get its license . . . A. Because the police has to give you a favorable report, and the police cannot give you a favorable report if the community opposes you.

Q. If any portion . . . A. If five people, six people oppose you, you've got a problem with the police department. They will not approve the license.

Q. Okay. So you're under . . . A. Secondly, you've got another important thing to remember with the police, very limited resources. The inability to

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[307] THE COURT: I want to get you out of here.

MR. TAYOUN: I'll behave, Your Honor.

THE COURT: Thank you.

A. Say that again.

Q. Did you know that people in the license issuance and the City of Philadelphia, did you know that they at times read the newspapers and hear what City Council people have to say? A. Yes.

Q. Now do you remember saying during that speech that — and I'll quote you. "It's obvious to us this, referring to After Midnight, brings hell, petulance, drugs and disease." Do you remember saying that? A. Yes.

Q. Did you think that putting that statement in the newspapers, which I think we can agree is a rather vivid and strong statement of your position, might influence anybody in the licensing field in the City of Philadelphia? A. No, sir.

Q. At this time did you know that After Midnight basically attracted young, black adults to its premises? A. I didn't go to find out who was there.

Q. I didn't ask you whether you went there, Councilman. I asked you whether you knew enough about it at the time that you came out against it so strongly to know that it attracted young, black adults?

* * *

[309] Q. How do you know whether people would go to After Midnight just to dance and not drink and do drugs and the rest of . . . A. The same operators . . .

Q. Excuse me, Councilman. Excuse me, Councilman. How do you know that young, black adults couldn't go to a facility like After Midnight just for the pleasure of dancing without also drinking and doing drugs? A. I don't know.

Q. You also talked to the paper about Down South, didn't you? A. Another paper, the South Street Star.

Q. You told them that "I am sure we will be able to close this one". How did you know? A. With community opposition remaining strong, the police department has no alternative but to turn down a license.

Q. But that's closed. A. That's it.

Q. You didn't . . . A. That closes it. And if you're going to turn down a license, you're going to knock them out of business. So that will close it.

Q. Councilman, you said that on September 25, 1988, you said, "I am sure we will be able to close this one". A. 1988?

Q. Are you aware that three days later violation notices were issued from the City of Philadelphia, Department of Licenses [310] and Inspections, to Down South? Do you know that? A. No, sir.

Q. Did you know that a week after that, your prediction came true? They closed them. They put a cease operation sticker right on the front door. Did you know that? A. No, sir.

Q. How did you know, to repeat the question, to be so certain to say I am sure we will be able to close this one just a week and a half before it actually happened? Close it. Not deny the dance hall license,- close it? A. I'm telling you — I just told you before and I'm telling you again.

Q. Experience. A. I knew it was going to close without a dance hall license, and it wasn't going to get a dance hall license without approval by the police. The fact that the Department of L&I acted in such wonderful — I mean such a great response amazes me because I can't get them to do half the things I want them to do.

Q. You said, Councilman, that Down South has no redeeming social value. Remember that quote? You said that on September 28th. A. Because the South Street neighbors, the South Street businessmen, the Queen Village neighbors, the Society Hill neighbors and the Washington Square West people complained

* * *

[9] Chudnoff's deposition.

"Q. Was it your understanding that there were any written guidelines or procedures which set forth the permissible basis for the board to make a decision on an appeal for a dance hall license.? A. No.

Q. No, there weren't any or, no, you're not aware of there being such? A. I'm not aware that there is or was such a guideline.

Q. When somebody would become appointed to the board for the first time, would you send them any information? A. Yes.

Q. What would you send them? A. I would send them the regulations from the Fire Department which were acceptable regulations and the Health Department, from the Police Department, every department, Health Department, that we were involved with so that they would have some background; like bathrooms, how many bathrooms in a restaurant. They would have to know what would be permissible, what's not permissible.

Q. With respect to a dance hall license, what would you send them? A. There was nothing specific for dance hall licenses."

On page 25.

"Q. Okay. But the question is, did you ever — you know, this [10] decision is announced, and when they announce their decision to the board, do they give the reason for their decision? A. No. The board does not usually do that.

Q. So that even if you looked at these transcripts, you wouldn't know what the basis of the decision was then, would you? A. No. The transcript would give exactly the information that was presented at the time.

Q. And then at the end, it would tell whoever the chairman is who would announce the decision. A. Yes.

Q. But you wouldn't know what the basis of the decision was because it's not announced. A. Frequently, that's the case."

That's all, Your Honor. Mr. Freeman has . . .

THE COURT: Mr. Freeman, you have some excerpts you wish to read in the interest . . .

MR. FREEMAN: Yes.

THE COURT: . . . of justice or fairness.

MR. FREEMAN: Page 19, question by counsel.

"Q. Are you aware of any decision where there was a hearing and there was evidence presented or arguments made where an appeal was denied based solely on community objections?"

Ms. Chudnoff says, "I can't remember." Okay.

"I'm not sure.

* * *

Plonski — Direct

[96] did you know that neighborhood approval was one of the

requirements for a dance hall license in the City of Philadelphia? A. I did not.

Q. Had you, from the time that you took over as commissioner of Licenses and Inspections, attempted to acquaint yourself with the requirements and the standards with respect to the various licenses for which your department was responsible? A. Eventually, yes.

Q. Okay. Did you at some time come to know that the department considered neighborhood objection to be one of the standards for a dance hall license? A. I did.

Q. How did you find that out? A. I was so advised by either a staff person or one of our attorneys.

Q. Did you ever see it in any law that the neighborhood . . . A. I did not, no.

Q. Excuse me? A. No, I did not.

Q. Did you ever ask your staff people or anybody else who advised you that this is what your department did, whether or not it was legal to consider neighborhood objections as a part of a dance hall license? A. I don't remember that.

Q. Do you know whether, during the course of your tenure as [97] commissioner of the Department of Licenses and Inspections, whether your department put forth any standard or written criteria as to the type of neighborhood objection which would be considered? A. They did not.

Q. Or the amount of neighborhood objection that would be considered? A. They did not.

Q. Do you know whether your department accepted automatically police recommendations regarding dance hall licenses which were predicated on neighborhood objections?

MR. FREEMAN: Your Honor, this has been established.

MR. TRACHTMAN: This is the commissioner of the department, and I think it's important for me to establish what he did and didn't do during this time.

THE COURT: I'll allow it in limited form.

A. Please ask the question again.

Q. Did you know at the time that the Department of Licenses and Inspections in ruling upon dance hall licenses accepted police recommendations automatically? If police said yes to the dance hall license, L & I said yes; if police said no, L & I said no. A. I think it depends on which time really. Early in my administration I would not know that.

Q. Later on . . .

* * *

[103] people outside of the dance hall, L & I would consider that in determining whether or not a dance hall license would issue. A. It wasn't up to L & I to question the police on their recommendation.

THE COURT: Just answer the question if you will please.

Try to answer the direct . . .

MR. FREEMAN: He wants a yes or no.

THE COURT: Try to answer the direct question put to you. Ask it again.

A. Ask it again.

Q. If the police considered matters pertaining to the conduct of people outside of the premises of a dance hall, then L & I would automatically consider it. A. Yes.

Q. Did L & I have the authority to issue licenses at this time or did the police have authority to issue licenses? A. L & I of course.

Q. But in this particular instance, no matter what the police considered L & I would also consider. A. That's right.

Q. And no matter what the police said with respect to the dance hall, that's what L & I would do. A. Yes.

Q. As the commissioner of Licenses and Inspections at the time, are you aware of any legal authority on which L & I could

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Barcliff — Direct

[221] Q. There's been . . . A. It's a procedure we just used for many, many years.

Q. And it's a procedure that's passed on orally. I mean it's not even memorialized anywhere in police manuals or procedures or anything like that, is it? A. No, sir. It's just the way we've done business.

Q. Okay. Now, with regard to this, you reached — by the way, as a part of preparing this information, did anybody on behalf of the Police Department talk to anybody at After Midnight? It doesn't reflect it in this report, does it?

MR. FREEMAN: It sure does.

THE COURT: Wait a minute. We have a witness on the stand.

MR. FREEMAN: Oh, excuse me; I'm sorry.

Q. I'm talking about After Midnight's operation, how it would resolve these problems being raised by the neighbors, substantive things like that. A. No, sir.

Q. In fact, what happens as a part of the procedure when this document is prepared is the police sergeant merely goes out and he finds some people in the immediate area at random; is that correct. A. Pretty much.

Q. If he knocks on a door and nobody's home, that person doesn't get interviewed. [222] A. Yes, sir.

Q. Once he gets five or ten people, the interviewing stops. A. Pretty much you're correct.

Q. He doesn't do anything by way of confirming whether or not what the person who he interviews says it — whether or not the content of that is true or false for example. If an accusation is made, he records it. He doesn't investigate as to whether or not there's any substance behind it. A. Again, the dance hall permit usually . . .

Q. If you could just answer . . .

MR. FREEMAN: May he explain the question?

THE COURT: No. He must answer the question.

Q. If you could answer my question as to whether or not this is what they do, and then if there's an explanation, we can hear it. My question was, does he do anything to verify whether or not the basis for the objection is valid, invalid, true, or false, or on the other hand, does he just record it on his report as to what was said? A. He just records what is told to him.

Q. Okay.

MR. FREEMAN: Now, may he explain, sir?

MR. TRACHTMAN: Well, is there an explanation?

[223] THE COURT: No, it doesn't require any explanation for that. It's clear enough.

MR. FREEMAN: Counsel said if he . . .

THE COURT: You may have him again. Let's clear it up.

Q. (by Mr. Trachtman) Now, there's no guidelines or anything in writing whatsoever which instructs the police sergeant who does the interviewing what it is that he's supposed to do, is there? Again, all of this is just tradition or policy or oral. A. That's correct.

Q. And when you eventually go about the business of making the recommendation that you make, there's no guidelines that relate to any of that either, is there? A. No, sir.

Q. There's nothing that says if so many are for or so many are against, here's what we do. It's just a judgment call in accordance with your judgment. A. Yes, sir, that's right.

Q. One other question with respect to this, Captain, before we move off of this specifically. The police investigation has absolutely nothing to do with whether or not the dance hall establishment complies with any code, ordinance, or safety requirement; is that correct? A. That's correct.

Q. You reached a conclusion on the last page of this which is signed by you and it says, ''Based on the opposition of the

* * *

[225] to a radio station called Power 99? A. No, sir.

Q. Do you know whether or not After Midnight for literally weeks previous to this grand opening . . .

MR. FREEMAN: All right. Objection, Your Honor. This is testimony.

THE COURT: Overruled. The door was opened.

Q. Do you happen to know whether or not for literally weeks previous to the grand opening, After Midnight heavily advertised that weekend on Power 99? A. Not aware of that.

Q. Well, when you say that there wasn't publicity with respect to this opening, you mean you as a police captain hadn't heard about it; isn't that correct? A. Yes, sir.

Q. You don't suppose you were the target audience for After Midnight, do you? A. I don't know.

Q. No. Did you happen to talk to anybody at After Midnight with respect to whether or not they thought or projected what their popularity would be in subsequent weekends, any information from them at all as to how many people they expected to draw, anything like that? A. No, sir.

Q. Now, when you talked to the newspapers around this time and [226] you told them that you thought — notwithstanding what you wrote here, you told them that you thought that the situation would be manageable with your current police resources, didn't you? A. I said I believed it would be manageable, yes.

Q. Why is it that at the same time that you wrote on this report that it would pose a problem for the neighborhood and the police — why is it that at the same time you wrote that, you told newspaper reporters that you thought the situation was manageable? A. Because at that particular time, as you stated earlier on a previous question, I thought that this might be a one-time situation. As it turned out, that was not the case.

Q. Do you know how many people came to After Midnight total on the following weekend after your report? A. I have no idea in the way of knowing.

Q. Do you have any . . . A. All I know is that there were large amounts of people coming and going. So it'd be difficult for me to tell exactly how many people. It may very well have been the three to 5,000 in and out.

Q. But you don't know. A. I have no way of counting.

Q. And just so that we're clear, when you talk about what happened on the weekends, how often were you personally there?

* * *

[97] Barcliff — Cross

persons with respect to why, other than the persons in the immediate area around After Midnight, why they wanted After Midnight to open and operate? You didn't seek that out? A. No, sir.

MR. FREEMAN: Asked and answered.

Q. Your answer was no? A. No.

Q. Were you aware of an organization in the area called Positive Force? An anti-drug youth organization. A. Yes, sir.

Q. Did you seek out from the people who ran Positive Force whether or not they believed that After Midnight was something that was very important to their work? A. I never heard that.

Q. Did you ask them anything? That's all I'm asking. A. I know who Positive Force is. I know who their leader is. And I spoke with them on many occasions about Positive Force, but that was never a topic discussed.

Q. Did you ever ask Positive Force whether or not they were for or against After Midnight? A. They never expressed that opinion to me.

Q. Did you ever ask . . .

THE COURT: No, the question was, did you ever ask, Captain? A. No, I did not ask.

Barcliff — Redirect

[98] Q. Did you ever hear of a group called Parents Against Drugs? A. No, sir.

Q. You ever heard of Barbara Daniels? A. No, sir.

Q. Did you ever appear at a West Poplar NAC meeting in order to determine or meet with the Board of Directors of the West Poplar NAC as to anything to do with the reasoning behind the position they were taking in favor of After Midnight? A. No, sir.

Q. Is there any reason other than policy as opposed to law that you decided to favor the not in my backyard people as opposed to the people a little further away from After Midnight? A. I've already answered that my opinion was that the people in the imediate area were the ones that were gonna be more seriously impacted by it.

Q. And just to close to the loop, if I might, thoses are the people who would be benefited by extra police presence that After Midnight was willing to pay for, weren't they? A. I don't understand.

Q. I'll pass it, Captain.

MR. TRACHTMAN: I don't have any other questions.

REDIRECT EXAMINATION

BY MR. FREEMAN:

Q. Who was the leader of Positive Force?

* * *

Welch — Direct

[167] Q. After May 31st when they found out what happened at the board hearing, were these same people willing any longer to back you financially?

MR. FREEMAN: Objection, Your Honor. This is hearsay.

THE COURT: No, overruled.

MR. FREEMAN: I can't cross-examine those people, sir.

THE COURT: Well, he's not asking what they said. He just asked if they were willing to do something and that's not hearsay as I understand it.

A. No, they were not willing to extend additional capital.

Q. Now, with respect to the cash flow drying up, there's been intimations in this case that the mere fact that you didn't have a dance hall license and the fact that you couldn't allow dancing per se would not hamper or destroy your ability to continue to generate money throught the business. In your experience at the club, is that true or not? A. Historically, you know, looking back on it it was absolutely true, but we retrenched for a few days after we lost that dance hall license hearing and Jim Helman and myself — and Jim was against opening the facility again without dancing. He thought it would hurt After Midnight, gave me his reasons for doing so. I on the other hand am a finance person and I had obligations to a great number of people and I decided that I would do anything possible to make that facility support itself, so I insisted on opening the club. [168] We spent tons of money promoting roller skating, bringing in entertainment, and the results of which were disaster. I mean, people would come to the club. They would come in droves and in numbers. When they learned they couldn't dance, they turned around and walked away.

Q. Okay. Now, after this denial by the board in May of 1988, I take it you became more personally involved in the dance hall license application process? A. Intimately.

Q. Okay. There's been testimony previously that towards the middle or end of June there was a meeting between Commissioner Mosley, Captain Barcliff, Solicitor Cole, a Mr. Green, and Attorney Pitkow, a Dorothy Gallman or Dorothy Williams, Joan Baizer, Mr. Helman, and yourself. Do you recall that? A. Yes, I do.

Q. And did you, in fact, attend such a meeting. A. Yes, I did.

Q. Who is Mr. Green? A. Norman Green is a vice president of Continental Bank and the president of West Poplar NAC.

Q. And what was the purpose of that meeting in June? A. Mr. Green called that meeting. He asked for it, he talked to the city officials, and he wanted to find some form of compromise. His max position was that they supported After Midnight and he didn't understand why they didn't approve the

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[175] A. Yes.

Q. And did you do any construction . . . A. Yes, we did.

Q. . . . for Down South? What did you do and how much did it cost? A. Basically, the construction was cosmetic. We increased the dance floor. The rest of the money was primarily used for a sound and light system, mirrors, painting, all cosmetic things.

Q. And how much went into those construction and improvements? A. Approximately $52,000.

Q. Now, with respect to the cash payment and the $52,000 in improvements, could you please tell the people on this jury where that money came from in terms of the names of the investors and the amount they put in? A. Yes. When I purchased the corporation I gave the, I guess it was a real estate company at the time, an $8,000 cash deposit. So I was left with the idea that

I had to raise the money for renovations and for the downpayment, so I sold part of the stock of the corporation. I sold 25% of the stock to Richard Singer for $50,000, and I sold I believe 15% of the stock to Curt Heidinger for $37,500, and Jim Helman and myself put in the balance of 15,000.

Q. Okay. Now, those investors that you just mentioned including yourself, did you or they ever get any of that money [176] back from the operations of Down South? A. No, we didn't.

Q. Now, Down South actually opened for business between August 5th and October 1 of 1988, is that correct? A. Actually, I think it was sometime late in July, but it was a ten week period of time.

Q. Okay. Did there come a time where it operated in a club format? A. Yes.

Q. Okay. And was there a time where it operated in a different format and then it changed to the club format? A. Yes, initially we had decided — Jim Helman and myself wanted a club for over 21's. The purpose of the club itself was to run with a liquor license. We soon learned that the liquor license could take as long as six months to transfer so we decided to open up on an over 21 basis anyway, and it was dismal. There were very few customers the first three weeks. To alter that, we changed our policy and we decided to go after a rap market on South Street. We advertised openly from the people who brought you After Midnight on South Street and we were instantly successful.

Q. And when did that new format go into effect, opening to the public? A. Three weeks after we opened.

Q. And for how many weekends did you run that format?

[178] Q. Okay. When you were that two blocks north away from the club, could you hear the music coming from inside the club? A. No, I could not.

Q. Did you ever see any drug sales taking place outside the club? A. No.

Q. Outside the club, in front of the club, did you ever see any fights taking place? A. No, I didn't.

Q. Did you ever see anybody outside the front of the club urinating on cars or on sidewalks or against buildings? A. No, sir, I didn't.

Q. Did you see any parking problems outside the club? A. Aside from opening night, no, I did not.

Q. Now, there came a time, did it not, where After Midnight closed its operations? A. Yes, it did.

Q. And when was that? A. April the 8th, 1989.

Q. And why did it cease operations at that time? A. The landlord chose to evict us.

Q. And for what reason? A. For the non-payment of past due rent.

Q. Okay. At that point, do you know how much the rent was in arrears? [179] A. Well, the rent itself, the current rent was paid and I had, you know, since we opened the operation back in December with a dance hall license, we were able to pay current bills. Unfortunately, we were saddled with a gigantic debt from the period of being closed down. The direct cost of that close down was $255,000. There was just no way that the operation in its new format could have supported that old debt plus, you know, the new ongoing expenses. So even though I could pay the current rent the order of the bankruptcy court was that I pay an additional five or $6,000 on the prior rent that was due at the bankruptcy, and that's the rent that I didn't pay, and that's what I was evicted for.

Q. Okay. Now, the cash flow, — you hear Mr. London testify, did you not? A. Yes, I did.

Q. And you testified previously concerning your anticipated profit of a million and a half to two million dollars a year. Now, at the time you were operating in March of 1989, were you generating that kind of income? A. In March of '89?

Q. Yes, sir. A. No, I wasn't.

Q. Why not? A. There's a host of reasons. Primarily, the close down period was so long at After Midnight. Some competitors opened

* * *

Herling — Cross

[246] THE COURT: The rules of evidence . . . A. Okay.

THE COURT: . . . that we operate under . . . A. Okay.

THE COURT: . . . provide that you must answer the question put to you.

MR. FREEMAN: Your Honor, objection. I think the witness is indicating that counsel has not read the entire applicable portion. So that the jury is not mislead . . .

THE COURT: Well, counsel, if he hasn't I'm sure you'll raise that and . . .

MR. TRACHTMAN: I read that.

THE COURT: . . . he has certainly has read. I'm following along. He's read what he said he's read. So ask the question again.

Q. Mr. Herling, it says here that the department shall determine whether the applicant is properly entitled to the license which he seeks. My question to you is, as it worked as a matter of policy, isn't it true that the police determined it and L & I automatically did whatever the police said? A. There are as many, many . . .

Q. Mr. Herling, try and answer my question yes or no and then . . .

THE COURT: It takes a yes or no or I don't know.

[247] A. The answer is that it states that the Department of License and Inspections makes the determination.

Q. And in fact aren't you aware that it was the police who made a recommendation which L & I automatically followed no matter what? Isn't that the way it worked? A. We followed it in this specific case.

Q. Didn't you follow it before January 15, 1988, in every case whatever the police said that's what you did? A. The police were part of the requirement.

Q. Try and answer my question, sir.

THE COURT: Commissioner, please, if you'll answer the question directly. A. Okay. I understand now. I'm sorry. I'm sorry. Forgive me.

THE COURT: Thank you.

Q. Isn't that the way it worked? A. That's generally the way it worked, yes.

Q. All right. Now, I want you to go down a little bit further to the middle of the page. Do you see the paragraph that begins with the word "The requirement", . . . A. Right.

Q. . . . do you see that? A. Right.

Q. It says, "The requirements and standards to be met by applicants for licenses shall be established by the department [248] in all cases in which the department is responsible for the functions involved." And then it goes on to talk about those standards. Did the department, pursuant to this Home Rule Charter, establish standards to be met by applicants which standards referred to winning a popularity contest in the neighborhood as a part of a dance hall license application? A. I don't know that they have to win a popularity contest. I believe it has to be inspected by the police department and they determine whether that particular area is safe for that particular activity.

Q. Well, let me ask you the question this way, sir. We've already had testimony from Captain Barcliff that the police in this case did nothing by way of determining compliance with codes, safety codes or fire codes or anything like that, but rather they did a criminal check on the applicants and they took a random survey of some people in the neighborhood . . .

MR. FREEMAN: Objection to random survey.

MR. TRACHTMAN: It was his word . . .

MR. FREEMAN: It was a survey of people in the immediate neighborhood. There was a deliberate . . .

MR. TRACHTMAN: It was Captain . . .

MR. FREEMAN: . . . plan to the survey. That's what . . .

MR. TRACHTMAN: It was Captain Barcliff's word.

THE COURT: The jury will recall.

[249] Q. Given that, sir, did the department as required by the Home Rule Charter determine requirements and standards to be met by applicants for license? Did they establish standards relating to, for example, what types of neighborhood objections would be considered? How much, what proportion of neighborhood objections? How neighborhood objections would be investigated or verified? Any standards whatsoever? A. We left that up to the police department.

Q. Is that another way of saying that the Department of Licenses and Inspections didn't promulgate or establish such standards? A. It promulgated many standards but that's a specific narrow, narrow issue and we did in that narrow, narrow issue.

THE COURT: Commissioner, I'm going to ask counsel to read that question once again. Then I'd like to ask you to respond to it directly. Would you please?

MR. TRACHTMAN: Thank you, sir.

Q. Did the Department of Licenses and Inspections establish requirements and standards to be met by applicants for dance hall licenses which requirements were standards in anyway referred to neighborhood objections and what one has to do to clear those neighborhood objections? A. No.

Q. Thank you, sir. Now, would you agree with me, Mr. Herling, that just like the Home Rule Charter has to be respected by

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[254] Q. Would you show me this statute that says you need police approval? And I got it nice and big here. The two sections that have already been identified. Show me where it says you need police approval. First, we got section 4735. A. Okay. It's the duty of the mayor to cause an investigation of the applications.

Q. For what? An investigation for what purpose, Mr. Herling? A. For the public safety.

Q. Well, why don't we read it exactly? It says, "Cause an investigation of all applications for public dance hall or ballroom licenses to determine whether or not the dance hall, ballroom, or academy sought to be licensed complies with the rules, regulations, ordinances and laws applicable thereto." That's the nature of the investigation, isn't it? A. It's to see that they're meeting all ordinance and regulations.

Q. Now, what ordinances and regulations do the police seek to find compliance with when they take a poll of some of the neighbors around the dance hall? Which ordinance or regulation is that? A. I think they go by their mission in the charter where it says that they are attempting to maintain public peace.

Q. Which ordinance or regulation? A. I said from the charter.

Q. Is the charter an ordinance or regulation? [255] A. I think it comes from — that — were these — not the state law, but where the city laws come from.

Q. Now, let's take this one step further, Mr. Herling. The procedures that existed at the time that you were the commissioner of L & I, and thereafter according to testimony that's been adduced by other witnesses, those procedures as you testified to before would not allow someone to so much as apply for a dance hall license until after the structure was already built and had a certificate of occupancy so that it passed all inspections, correct? A. Yes.

Q. And in order to get a certificate of occupancy one has to undergo inspections by the Department of L & I, isn't that right? A. Yes.

Q. And in order to pass those inspections from L & I one has to spend the money that's necessary to build the structure inclusive of all of the things that are necessary to meet the various codes, isn't that so? A. Yes.

Q. What was the reason previous to January 15, 1988, so far as you know, whereby someone had to build first and then find out whether they could use their building later on? A. My view on that was that the police would not be able to give you a view of what's going on at a vacant lot.

[256] Q. So your testimony is that, for example, if neighborhood objections were a part of this procedure that the procedure that made sense so far as you could tell was require the person to spend the money, build it, and then begin operating it, and then find out whether the neighbors liked it or not, and then the owner would be told whether or not he could use the building based upon whether those neighbors liked it? A. I don't suggest he has to wait. I think that he can make a determination prior to that by his own initiative; his own communications; his own checking out what the regulations and rules and the standards and what the police are going to utilize.

Q. Which regulations and rules is it that he would look at, sir? A. To preserve peace in the community.

Q. So an applicant for a dance hall license would, after reading the Dance Hall Act and after reading perhaps this pamphlet should also go ahead and what, read the Home Rule Charter in the effort to find out whether the city would impose any other requirements on him? A. I would suggest that if he is a representative of a developer that's spending a large amount of money, and this is because I see them doing it over and over again, they do check these things out as a matter of course.

Q. Sir, would you agree with me that if you read all of the codes and ordinances of the City of Philadelphia, you would [257] find no reference to neighborhood objections or the obligation to satisfy a poll of neighbors as being a requirement for a dance hall license applicant in the City of Philadelphia? A. I would concur with you.

Q. So that if an applicant came forward and said, geeze, the Dance Hall Act says what it says, but maybe there's something else. This pamphlet says what it says, but maybe there's something else. If that applicant read every single code that was published in the City of Philadelphia, he still wouldn't find it out, would he? A. If he lives in a vacuum and doesn't ask others, yes.

Q. You weren't here when Mr. Plonski testified, were you? A. No, I just came.

Q. Mr. Plonski testified that a month after he was the commissioner he didn't know that neighborhood objections were required either. Do you have any explanation for that? A. I would suggest — this is an opinion now, okay if I . . .

Q. I don't want you to give the opinion. I want to know if you have factual explanation why Mr. Plonski, the commissioner of L & I, didn't know that. Do you know? A. I don't think that dance halls are the prime thing of a commissioner's life. I think that his life is concerned about life safety issues which are the paramount reason for his being, and which he spends most of his time.

Q. There's nothing in the law in 1988 so far as you knew that

* * *

[14] Q. All right. So, you just don't recall. You don't have notes, or anything like that? A. Oh no, I took no notes.

Q. Okay. When you were advised by the West Poplar NAC that — whatever it was — that the West Poplar NAC was in favor of After Midnight, do you recall saying to the West Poplar NAC words to the effect that it really doesn't matter. We just have to follow whatever the police say we have to do? A. That's the correct context. Whether I used that exact wording is questionable, but yes, I did say in every instance to either side of the issue that the position of the department was that we have to wait until the police give us their recommendation before we issue the license.

Q. So, I just want to be clear on this, and just tie the loop with regard to this. You were aware of the dance hall act. You were aware of support in the community. You were aware of opposition in the community, and your response to that was whatever the police decide, that's what the department of licenses and inspections does. A. That's correct.

Q. You testified on direct with respect to a meeting that you had in June with supporters and opponents of After Midnight and various other personnel from the city, do you remember that? Yes.

Q. Your testimony yesterday? I just want to clarify [15] something with respect to that. You testified yesterday that you said to the After Midnight people at that meeting that they had to have two things, that they had to have a certificate of — excuse me — a certificate of occupancy, and police approval. Just to key you into the chronology, Mr. Mosley, the record reflects at this point, that in April, which would have been about two months before your meeting with the After Midnight personnel, After

Midnight had received its certificate of occupancy. Do you recall that, or did you know that? A. That's probably correct.

Q. Okay. A. That does not change my statements that these are the things you require — or acquire.

Q. All right. A. Now, I didn't indicate that it did not have it. I said these are the things you must have to open that facility.

Q. So, when — A. The certificate of occupancy is a very critical document because it then points out that you have met all the life safety issues, and that was very much a concern of mine.

Q. And indeed, you had already reached the conclusion previous to that meeting that you had in June that there were no life safety issues left with respect to After Midnight, isn't that so? A. That is correct. They had been corrected.

* * *

Baizer — Cross

[71] Q. Were you aware of the fact that Captain Barcliff had recommended to his superiors in the police hierarchy, that After Midnight's offer to pay for extra police protection be accepted? A. No, I didn't.

MR. FREEMAN: Objection. That wasn't the recommendation. He just passed it along.

THE COURT: The jury will recall what was said.

Q. And Captain Barcliff never said anything to you about, Ms. Baizer, maybe you ought to rethink your position, we've got laws here, maybe you ought to compromise, anything like that? A. It was never discussed further beyond that particular meeting.

Q. You attended a speech by Councilman Tayoun on South Street on one occasion, did you not? A. Yes, I did.

Q. And did you hear what Councilman Tayoun said at that speech, his words at that speech with regard to how the After Midnight dance hall license came to be turned down?

MS. LAFLIN: Object, your Honor. We're well beyond the scope of direct on this. There was nothing with respect to South Street on this, and we're just going on forever.

THE COURT: No, I think not. Overruled.

A. Can you ask the question again?

Q. I want to know what you heard Councilman Tayoun say as to [72] why After Midnight's dance hall license was denied? A. Well, I don't remember why. I don't even think he mentioned why it was denied. I know he — it was pretty humerous. He took credit for denial. I don't know where he —

Q. Humerous to you? A. Pardon me?

Q. Humerous that you found it funny? A. Well, I remember making a comment to the woman sitting next to me, which is also in my — in my deposition, and forgive my language, but I told the lady sitting next to me that he didn't do shit. And that was how I felt, and how the community felt that he was just, you know, being a politician, and he was up there in front of another community group talking the way politicians have a tendency to do.

Q. And at the same time, you told me under oath at your deposition that you didn't know one way or the other what Councilman Tayoun did. Isn't that so? A. That's right. I mean, I — I said that, and when I say that he didn't do anything, he didn't do anything as far as I could see, and as far as the community could see, and it was the community's opinion and perception that he did nothing.

Q. But he took the credit in that speech, didn't he? A. Well, he did that day, yeah, yeah.

Q. Yeah. With respect to this neighborhood, you had never

* * *

Cole — Cross

[213] is one way or the other. The jury heard that testimony, you need not repeat it.

Q. Mr. Cole, when you had meetings with the opponents in March, were your superiors in the City Solicitor Department there? A. Yes.

Q. Did you explain the dance hall license procedures to those opponents at that time? A. Yes.

Q. Did you ever invite After Midnight to that meeting? A. No.

Q. Didn't Dorothy Gallman Williams tell you at that meeting that what she really wanted to have at that location was a laundromat? A. Or retail stores —

Q. Okay. A. — or something.

Q. You handled the May 31 case, as you testified, and previously you spoke to the attorney for some of the opponents, didn't you? A. He called me.

Q. He asked you how does the Board work and what do they consider, didn't he? A. Yes.

Q. And you explained to this what the Board considered, didn't

Appendix G

EXHIBIT P6 — APPLICATION FOR ZONING PERMIT

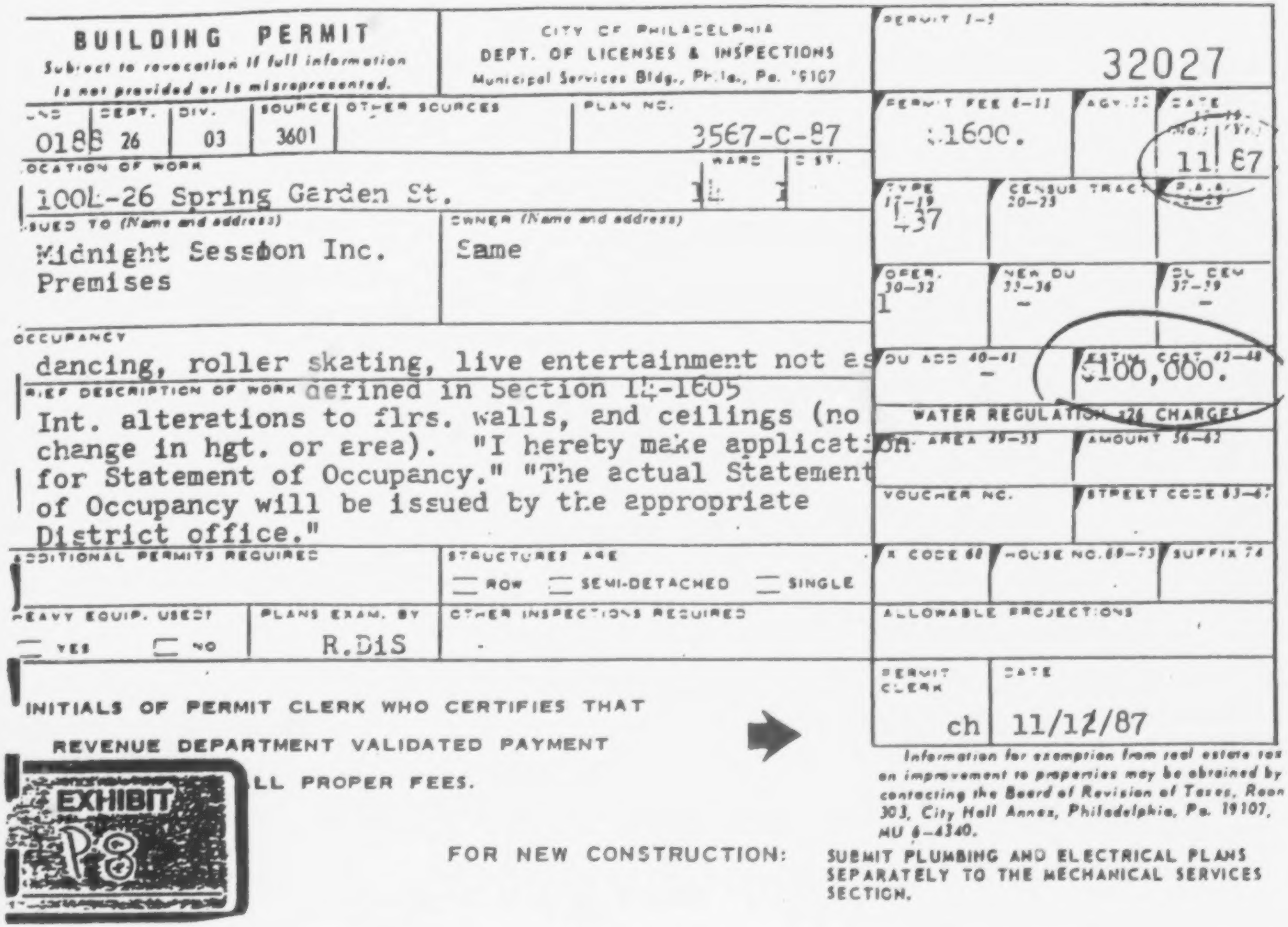
(Because of Quality of Exhibit it Cannot be Reproduced)

Appendix G

EXHIBIT P7 — APPLICATION FOR BUILDING PERMIT

(Because of Quality of Exhibit it Cannot be Reproduced)

EXHIBIT P8 — BUILDING PERMIT



BUILDING PERMIT
Subject to revocation if full information is not provided or is misrepresented.

CITY OF PHILADELPHIA
DEPT. OF LICENSES & INSPECTIONS
Municipal Services Bldg., Phila., Pa. 19107

PERMIT 1-5: 32027

FUND: 0188	DEPT.: 26	DIV.: 03	SOURCE: 3601	OTHER SOURCES:	PLAN NO.: 3567-C-87

PERMIT FEE 6-11: $1600.
AGY. 12:
DATE 13-16: Mo. 11 Yr. 87

LOCATION OF WORK: 1001-26 Spring Garden St.
WARD: 14
D. ST.:

TYPE 17-19: 437
CENSUS TRACT 20-23:
P.A.A.:

ISSUED TO (Name and address): Midnight Sessbon Inc. Premises
OWNER (Name and address): Same

OPER. 30-32: 1
NEW DU 33-36: –
DU DEM 37-39: –

OCCUPANCY: dancing, roller skating, live entertainment not as defined in Section 14-1605

DU ADD 40-41: –
ESTIM. COST 42-48: $100,000.

BRIEF DESCRIPTION OF WORK: Int. alterations to flrs. walls, and ceilings (no change in hgt. or area). "I hereby make application for Statement of Occupancy." "The actual Statement of Occupancy will be issued by the appropriate District office."

WATER REGULATION 326 CHARGES
AREA 49-55:
AMOUNT 56-62:
VOUCHER NO.:
STREET CODE 63-67:
R CODE 68:
HOUSE NO. 69-73:
SUFFIX 74:

ADDITIONAL PERMITS REQUIRED:
STRUCTURES ARE: ☐ ROW ☐ SEMI-DETACHED ☐ SINGLE
ALLOWABLE PROJECTIONS:
HEAVY EQUIP. USED? ☐ YES ☐ NO
PLANS EXAM. BY: R.DiS
OTHER INSPECTIONS REQUIRED: -

INITIALS OF PERMIT CLERK WHO CERTIFIES THAT REVENUE DEPARTMENT VALIDATED PAYMENT OF ALL PROPER FEES. ➡

PERMIT CLERK: ch
DATE: 11/12/87

Information for exemption from real estate tax on improvement to properties may be obtained by contacting the Board of Revision of Taxes, Room 303, City Hall Annex, Philadelphia, Pa. 19107, MU 6-4340.

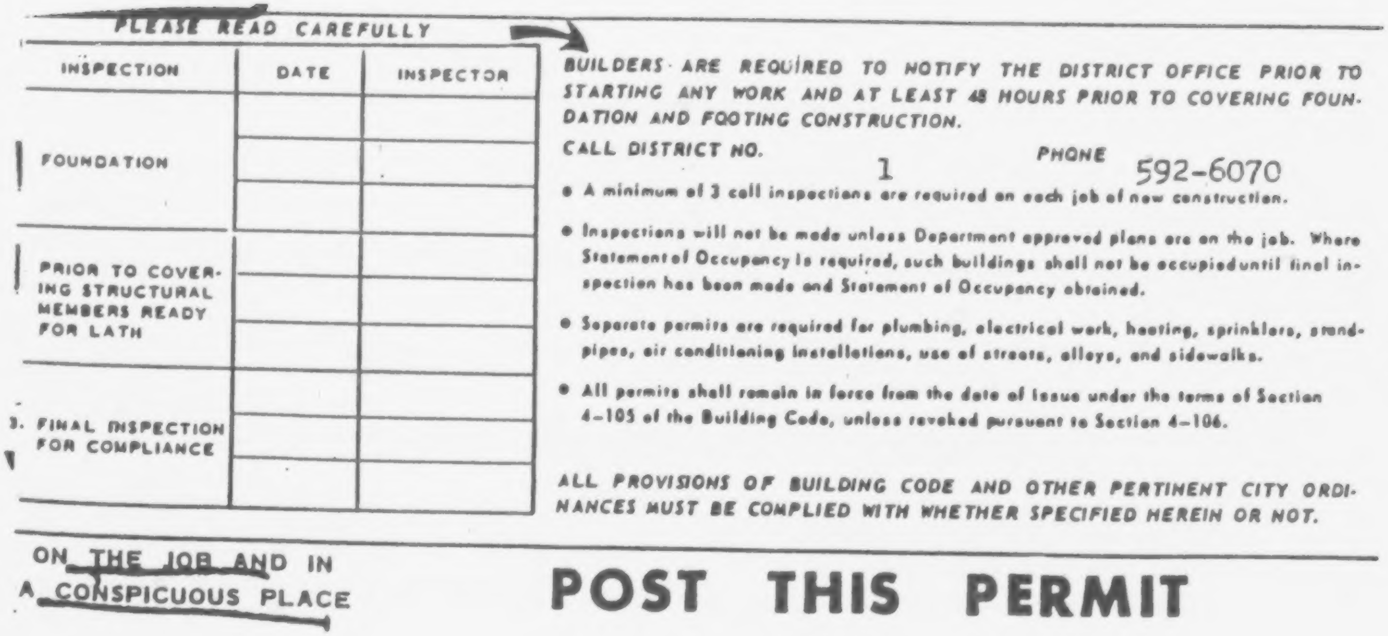
FOR NEW CONSTRUCTION: SUBMIT PLUMBING AND ELECTRICAL PLANS SEPARATELY TO THE MECHANICAL SERVICES SECTION.

EXHIBIT P8

BEST AVAILAB

LE COPY

Appendix G



PLEASE READ CAREFULLY

INSPECTION	DATE	INSPECTOR
FOUNDATION		
PRIOR TO COVERING STRUCTURAL MEMBERS READY FOR LATH		
3. FINAL INSPECTION FOR COMPLIANCE		

BUILDERS ARE REQUIRED TO NOTIFY THE DISTRICT OFFICE PRIOR TO STARTING ANY WORK AND AT LEAST 48 HOURS PRIOR TO COVERING FOUNDATION AND FOOTING CONSTRUCTION.

CALL DISTRICT NO. 1 PHONE 592-6070

- A minimum of 3 call inspections are required on each job of new construction.
- Inspections will not be made unless Department approved plans are on the job. Where Statement of Occupancy is required, such buildings shall not be occupied until final inspection has been made and Statement of Occupancy obtained.
- Separate permits are required for plumbing, electrical work, heating, sprinklers, standpipes, air conditioning installations, use of streets, alleys, and sidewalks.
- All permits shall remain in force from the date of issue under the terms of Section 4–105 of the Building Code, unless revoked pursuant to Section 4–106.

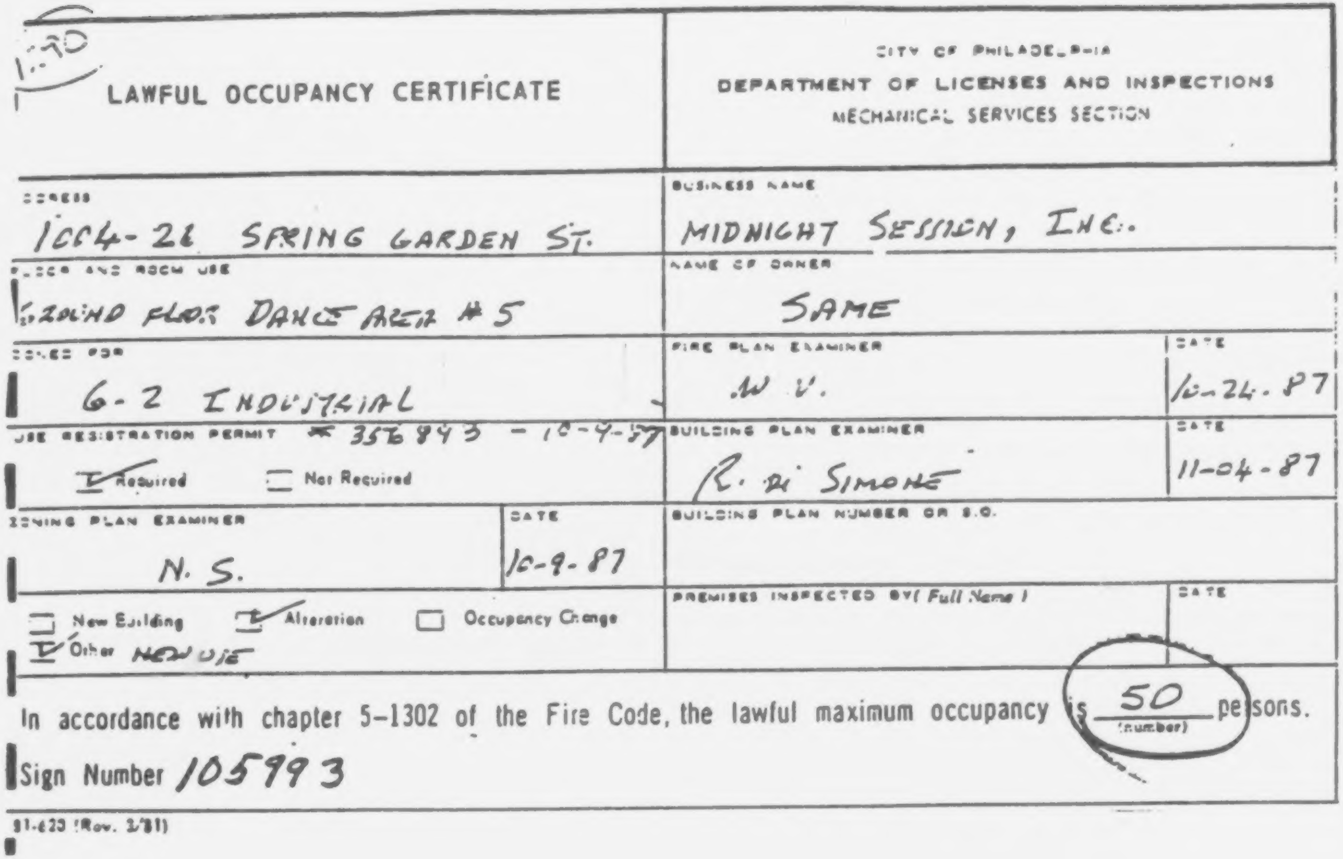
ALL PROVISIONS OF BUILDING CODE AND OTHER PERTINENT CITY ORDINANCES MUST BE COMPLIED WITH WHETHER SPECIFIED HEREIN OR NOT.

ON THE JOB AND IN A CONSPICUOUS PLACE

POST THIS PERMIT

Appendix G

EXHIBIT P9 — LAWFUL OCCUPANCY CERTIFICATES



1-RD

LAWFUL OCCUPANCY CERTIFICATE

CITY OF PHILADELPHIA
DEPARTMENT OF LICENSES AND INSPECTIONS
MECHANICAL SERVICES SECTION

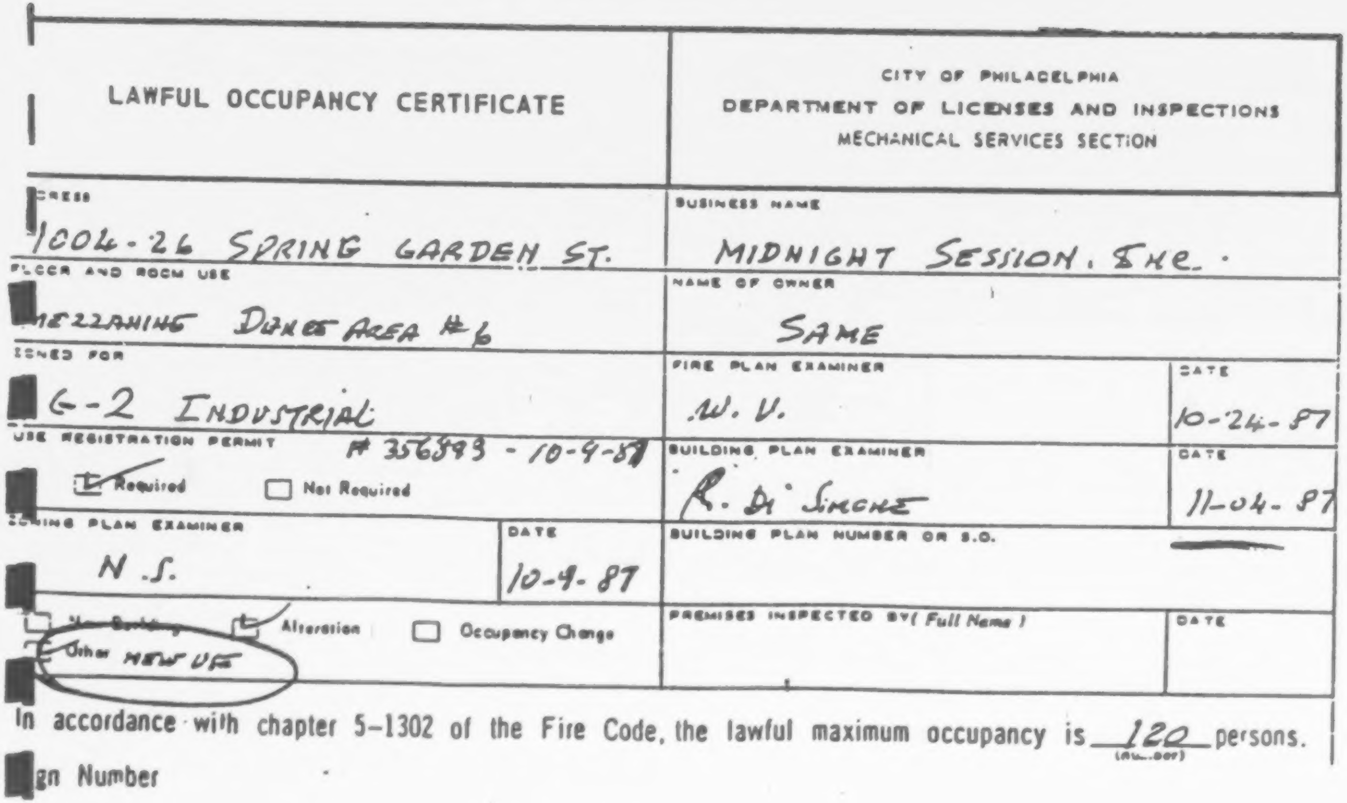
ADDRESS 1004-26 SPRING GARDEN ST.	BUSINESS NAME MIDNIGHT SESSION, INC.	
FLOOR AND ROOM USE GROUND FLOOR DANCE AREA #5	NAME OF OWNER SAME	
ZONED FOR G-2 INDUSTRIAL	FIRE PLAN EXAMINER W. V.	DATE 10-24-87
USE REGISTRATION PERMIT #356843 - 10-9-87 ☒ Required ☐ Not Required	BUILDING PLAN EXAMINER R. Di Simone	DATE 11-04-87
ZONING PLAN EXAMINER N. S. — DATE 10-9-87	BUILDING PLAN NUMBER OR S.O.	
☐ New Building ☒ Alteration ☐ Occupancy Change ☒ Other NEW USE	PREMISES INSPECTED BY (Full Name)	DATE

In accordance with chapter 5–1302 of the Fire Code, the lawful maximum occupancy is 50 (number) persons.

Sign Number 105993

81-623 (Rev. 2/81)

Appendix G

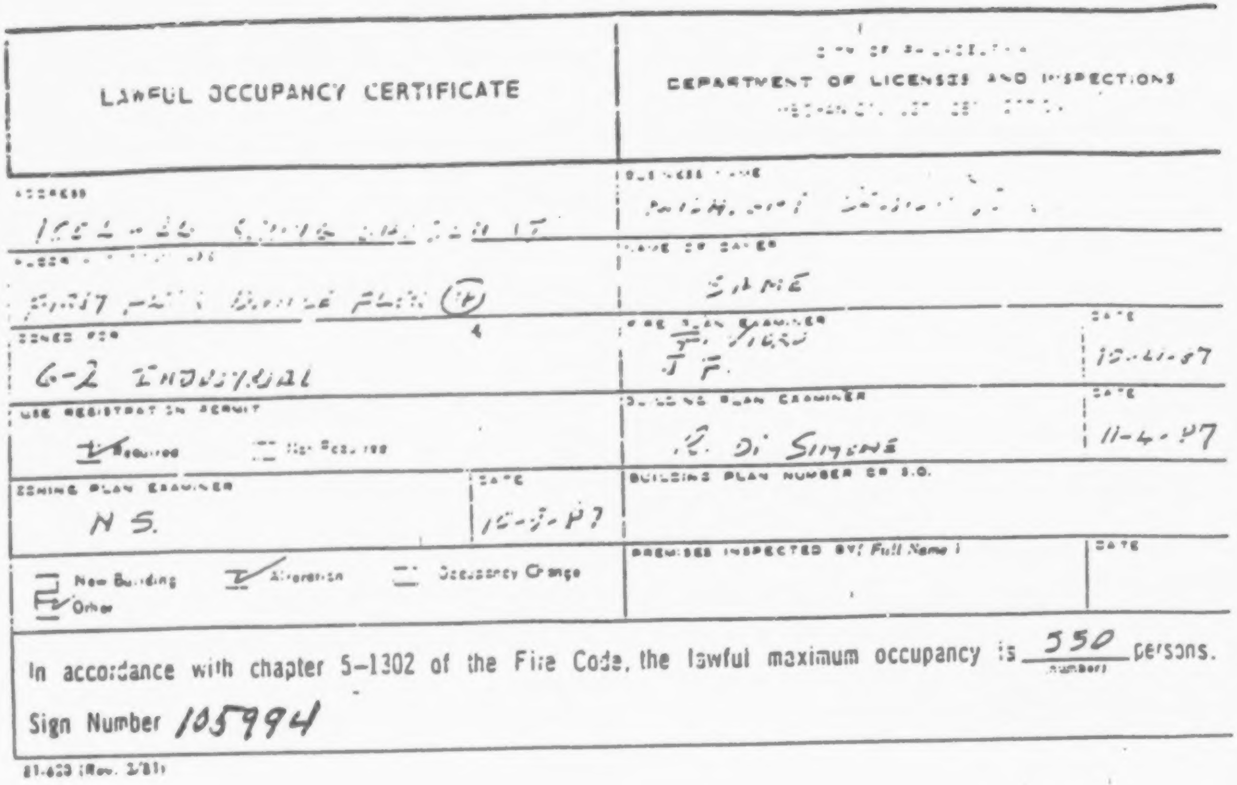


LAWFUL OCCUPANCY CERTIFICATE		CITY OF PHILADELPHIA DEPARTMENT OF LICENSES AND INSPECTIONS MECHANICAL SERVICES SECTION	
DRESS 1004-26 SPRING GARDEN ST.		BUSINESS NAME MIDNIGHT SESSION, INC.	
FLOOR AND ROOM USE MEZZANINE DANCE AREA #6		NAME OF OWNER SAME	
ZONED FOR G-2 INDUSTRIAL		FIRE PLAN EXAMINER W. V.	DATE 10-24-87
USE REGISTRATION PERMIT # 356893 - 10-9-87 ☑ Required ☐ Not Required		BUILDING PLAN EXAMINER R. Di Simone	DATE 11-04-87
ZONING PLAN EXAMINER N. S.	DATE 10-9-87	BUILDING PLAN NUMBER OR S.O. —	
☐ New Building ☑ Alteration ☐ Occupancy Change [✓ ☐ Other NEW USE]		PREMISES INSPECTED BY (Full Name)	DATE

In accordance with chapter 5-1302 of the Fire Code, the lawful maximum occupancy is 120 persons.

gn Number

Appendix G



LAWFUL OCCUPANCY CERTIFICATE

[illegible]
DEPARTMENT OF LICENSES AND INSPECTIONS
[illegible]

ADDRESS
[illegible]

BUSINESS NAME
[illegible]

NAME OF OWNER
SAME

[illegible]
[illegible] (4)

ZONED FOR
G-2 INDIVIDUAL

FIRE PLAN EXAMINER
T. VIERA
J F.
DATE
10-21-87

USE REGISTRATION PERMIT
☑ Required ☐ Not Required

BUILDING PLAN EXAMINER
R. Di Simone
DATE
11-4-87

ZONING PLAN EXAMINER
N S.
DATE
10-9-87

BUILDING PLAN NUMBER OR S.O.

☐ New Building ☑ Alteration ☐ Occupancy Change
☑ Other

PREMISES INSPECTED BY: (Full Name)
DATE

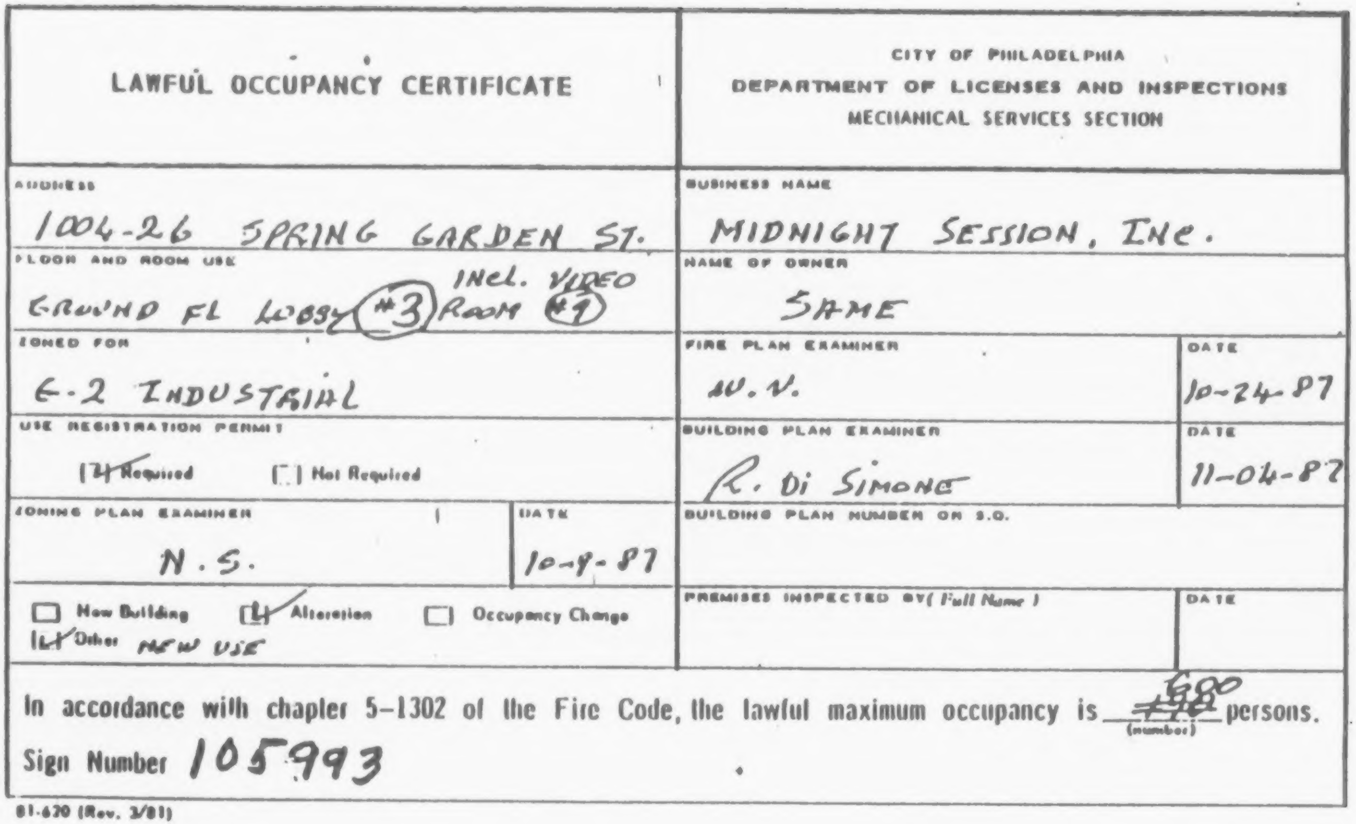
In accordance with chapter 5-1302 of the Fire Code, the lawful maximum occupancy is 550 (number) persons.

Sign Number 105994

81-623 (Rev. 2/81)

BEST AVAILABL

Appendix G



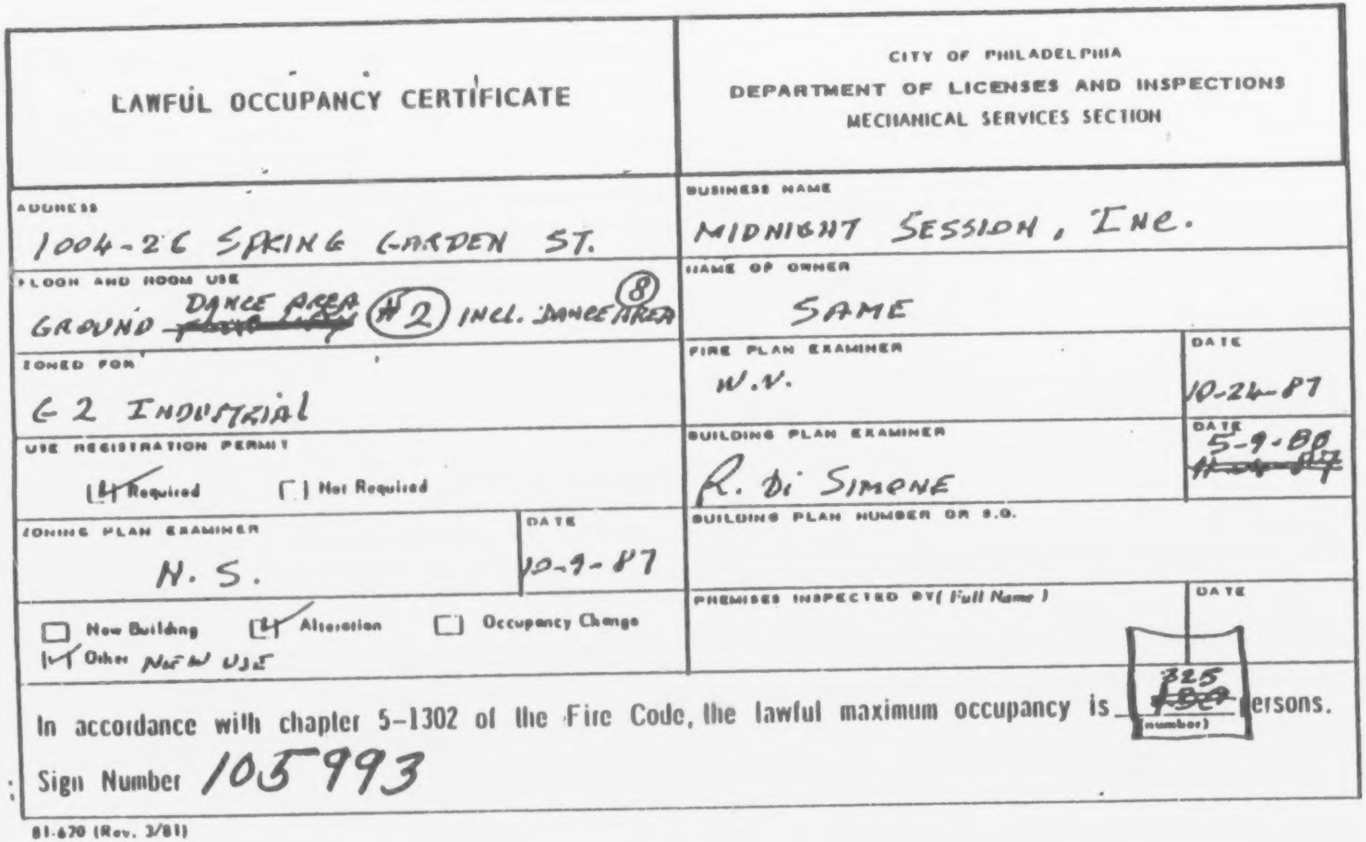
LAWFUL OCCUPANCY CERTIFICATE	CITY OF PHILADELPHIA DEPARTMENT OF LICENSES AND INSPECTIONS MECHANICAL SERVICES SECTION
ADDRESS 1004-26 SPRING GARDEN ST.	BUSINESS NAME MIDNIGHT SESSION, INC.
FLOOR AND ROOM USE GROUND FL LOBBY (#3) INCL. VIDEO ROOM (#1)	NAME OF OWNER SAME
ZONED FOR G-2 INDUSTRIAL	FIRE PLAN EXAMINER: W.V. — DATE: 10-24-87
USE REGISTRATION PERMIT ☒ Required ☐ Not Required	BUILDING PLAN EXAMINER: R. Di SIMONE — DATE: 11-04-87
ZONING PLAN EXAMINER: N.S. — DATE: 10-9-87	BUILDING PLAN NUMBER ON S.O.
☐ New Building ☒ Alteration ☐ Occupancy Change ☒ Other NEW USE	PREMISES INSPECTED BY (Full Name) — DATE

In accordance with chapter 5–1302 of the Fire Code, the lawful maximum occupancy is 600 (number) persons.

Sign Number 105993

81-620 (Rev. 3/81)

Appendix G



LAWFUL OCCUPANCY CERTIFICATE

CITY OF PHILADELPHIA
DEPARTMENT OF LICENSES AND INSPECTIONS
MECHANICAL SERVICES SECTION

ADDRESS: 1004-26 SPRING GARDEN ST.

BUSINESS NAME: MIDNIGHT SESSION, INC.

FLOOR AND ROOM USE: GROUND DANCE AREA ~~[illegible]~~ ②#2 INCL. DANCE AREA ⑧

NAME OF OWNER: SAME

ZONED FOR: G 2 INDUSTRIAL

FIRE PLAN EXAMINER: W.V. DATE: 10-24-87

USE REGISTRATION PERMIT: ☑ Required ☐ Not Required

BUILDING PLAN EXAMINER: R. Di Simone DATE: 5-9-88 ~~[illegible]~~

ZONING PLAN EXAMINER: N. S. DATE: 10-9-87

BUILDING PLAN NUMBER OR S.O.:

☐ New Building ☑ Alteration ☐ Occupancy Change
☑ Other NEW USE

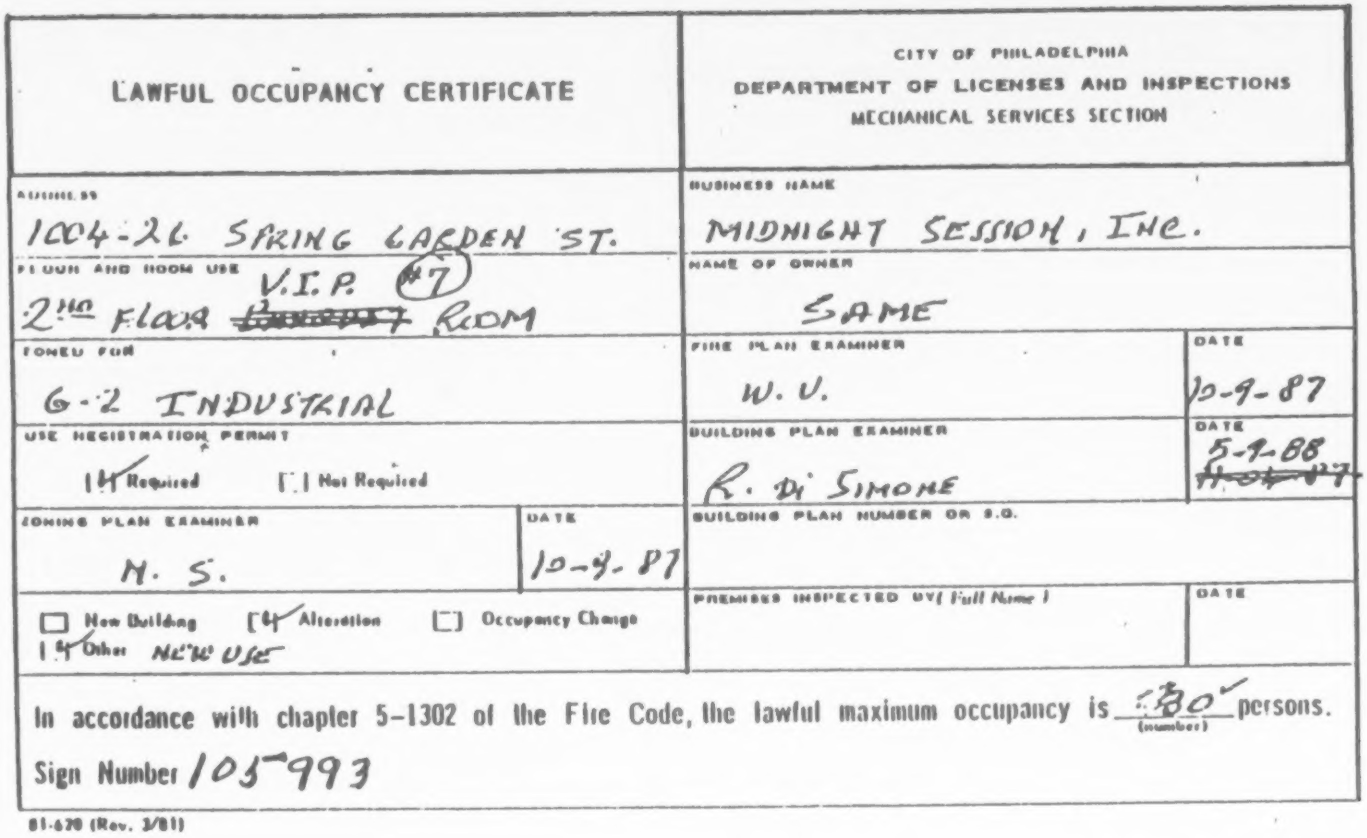
PREMISES INSPECTED BY (Full Name): DATE:

In accordance with chapter 5-1302 of the Fire Code, the lawful maximum occupancy is 325 ~~[illegible]~~ (number) ersons.

Sign Number 105993

81-670 (Rev. 3/81)

Appendix G



LAWFUL OCCUPANCY CERTIFICATE

CITY OF PHILADELPHIA
DEPARTMENT OF LICENSES AND INSPECTIONS
MECHANICAL SERVICES SECTION

ADDRESS: 1004-26 SPRING GARDEN ST.

BUSINESS NAME: MIDNIGHT SESSION, INC.

FLOOR AND ROOM USE: 2ND FLOOR ~~[illegible]~~ V.I.P. ROOM #7

NAME OF OWNER: SAME

ZONED FOR: G-2 INDUSTRIAL

FIRE PLAN EXAMINER: W. U. DATE: 10-9-87

USE REGISTRATION PERMIT: ☑ Required ☐ Not Required

BUILDING PLAN EXAMINER: R. Di SIMONE DATE: 5-9-88 ~~[illegible]~~

ZONING PLAN EXAMINER: M. S. DATE: 10-9-87

BUILDING PLAN NUMBER OR S.O.:

PREMISES INSPECTED BY (Full Name): DATE:

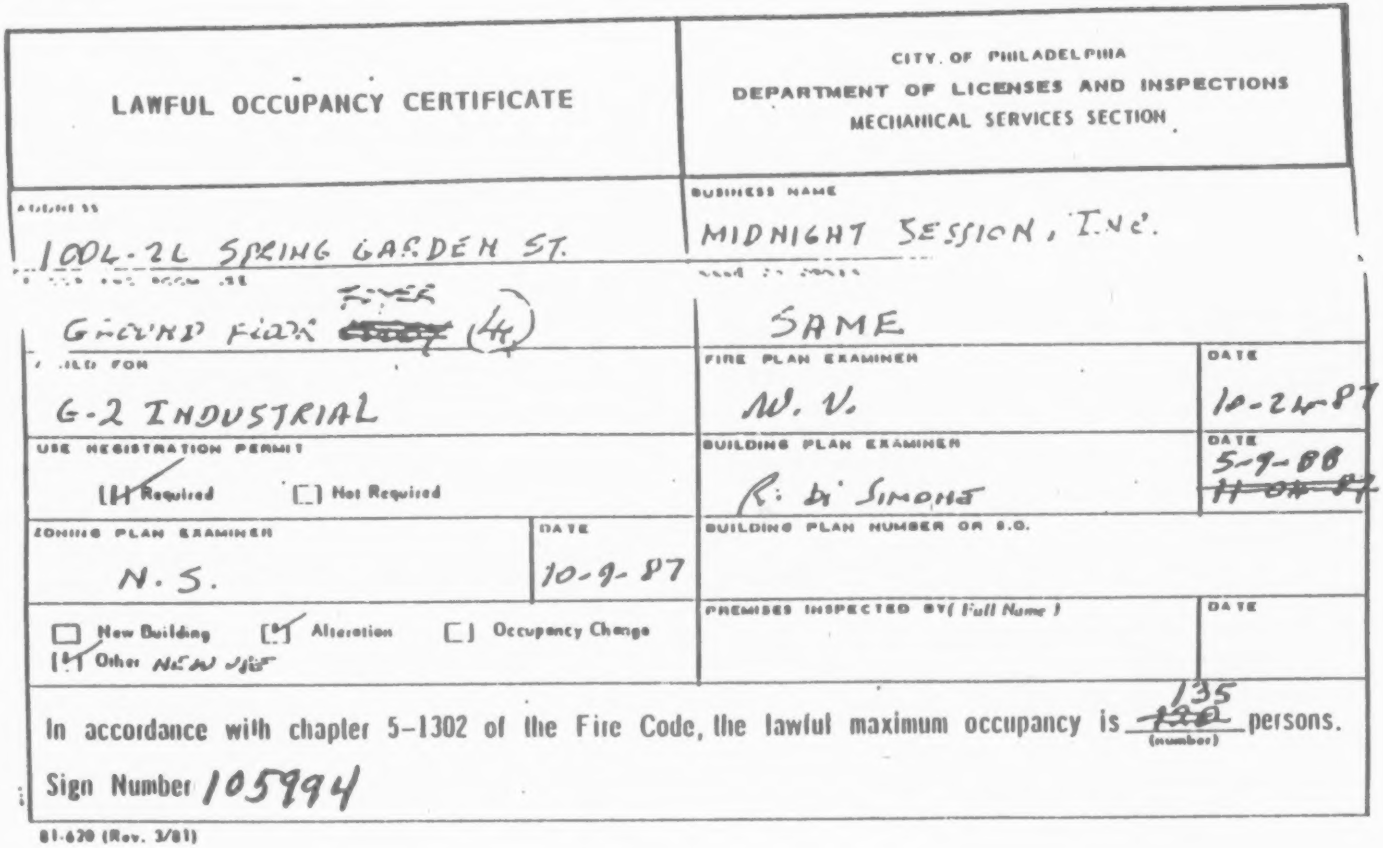
☐ New Building ☑ Alteration ☐ Occupancy Change
☑ Other NEW USE

In accordance with chapter 5-1302 of the Fire Code, the lawful maximum occupancy is 130 ✓ (number) persons.

Sign Number 105-993

81-670 (Rev. 3/81)

Appendix G



LAWFUL OCCUPANCY CERTIFICATE

CITY OF PHILADELPHIA
DEPARTMENT OF LICENSES AND INSPECTIONS
MECHANICAL SERVICES SECTION

ADDRESS: 1004-26 SPRING GARDEN ST.

BUSINESS NAME: MIDNIGHT SESSION, INC.

[illegible]: GROUND FLOOR FOYER ~~[illegible]~~ (4)

[illegible]: SAME

[illegible] FOR: G-2 INDUSTRIAL

FIRE PLAN EXAMINER: W. V. DATE: 10-24-87

USE REGISTRATION PERMIT: ☑ Required ☐ Not Required

BUILDING PLAN EXAMINER: R. Di Simone DATE: 5-9-88 ~~11-04-87~~

ZONING PLAN EXAMINER: N. S. DATE: 10-9-87

BUILDING PLAN NUMBER OR S.O.:

☐ New Building ☑ Alteration ☐ Occupancy Change
☑ Other NEW USE

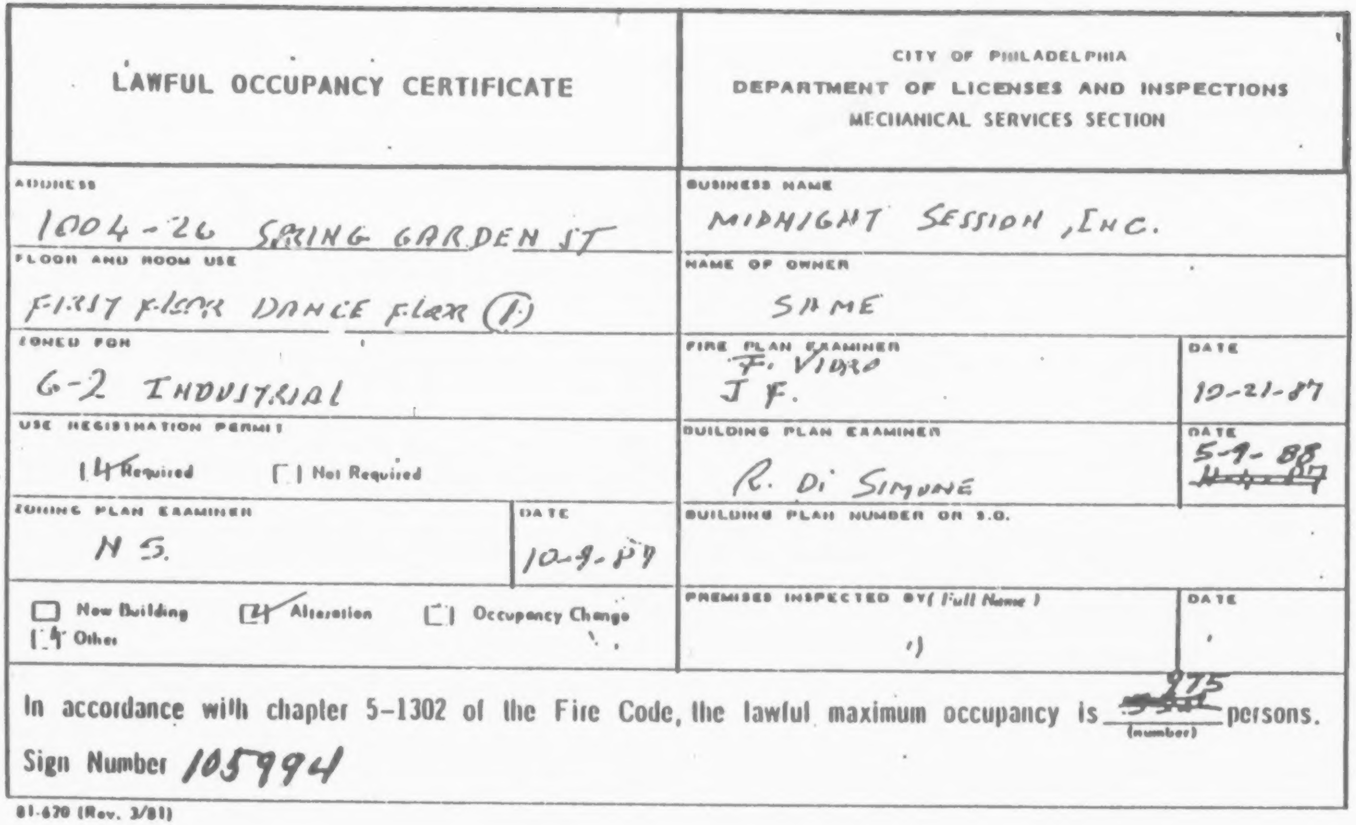
PREMISES INSPECTED BY (Full Name): DATE:

In accordance with chapter 5-1302 of the Fire Code, the lawful maximum occupancy is ~~120~~ 135 (number) persons.

Sign Number 105994

81-620 (Rev. 3/81)

Appendix G



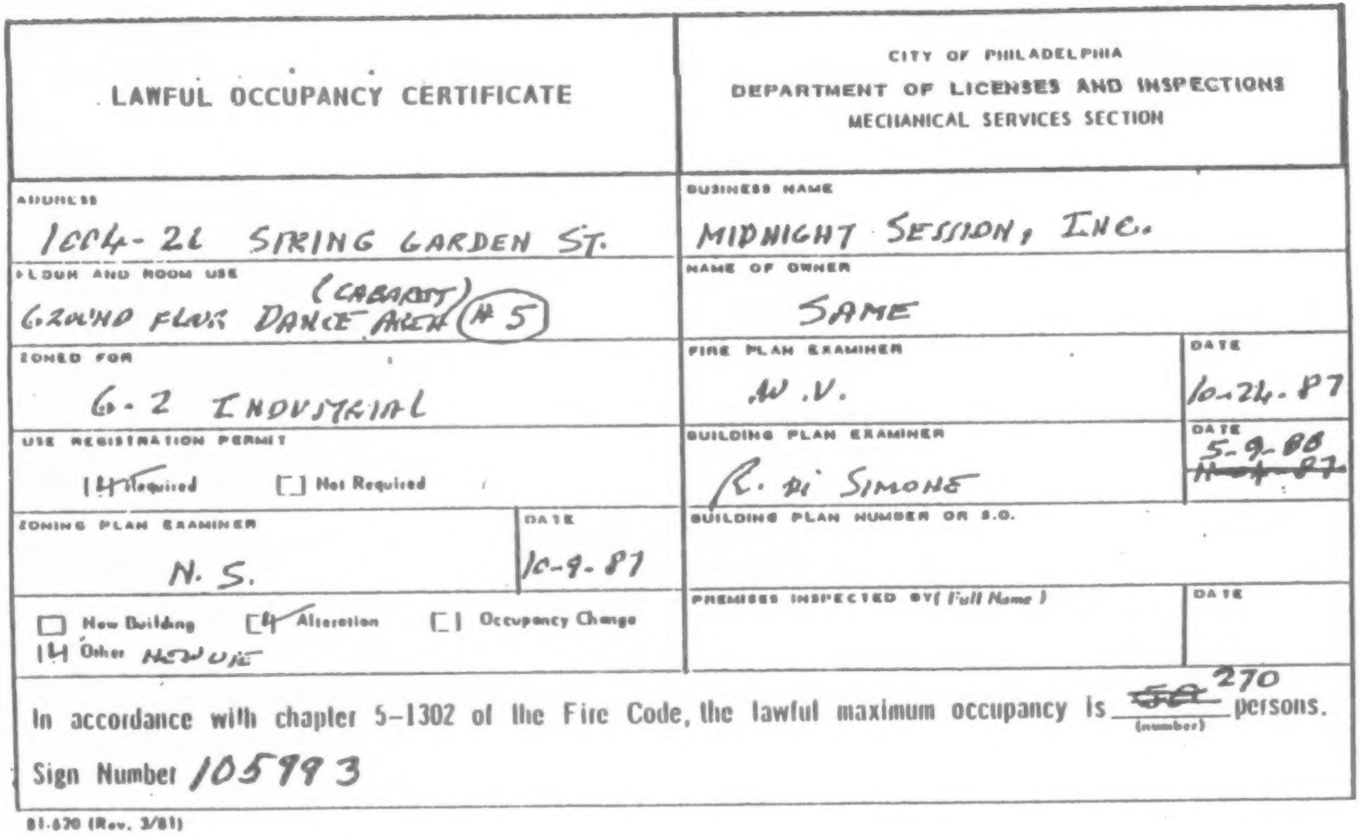
LAWFUL OCCUPANCY CERTIFICATE		CITY OF PHILADELPHIA DEPARTMENT OF LICENSES AND INSPECTIONS MECHANICAL SERVICES SECTION	
ADDRESS 1004-26 SPRING GARDEN ST		BUSINESS NAME MIDNIGHT SESSION, INC.	
FLOOR AND ROOM USE FIRST FLOOR DANCE FLOOR (1)		NAME OF OWNER SAME	
ZONED FOR G-2 INDUSTRIAL		FIRE PLAN EXAMINER F. VIDRO J F.	DATE 10-21-87
USE REGISTRATION PERMIT ☑ Required ☐ Not Required		BUILDING PLAN EXAMINER R. Di SIMONE	DATE 5-9-88 ~~[illegible]~~
ZONING PLAN EXAMINER N S.	DATE 10-9-87	BUILDING PLAN NUMBER OR S.O.	
☐ New Building ☑ Alteration ☐ Occupancy Change ☑ Other		PREMISES INSPECTED BY (Full Name)	DATE

In accordance with chapter 5-1302 of the Fire Code, the lawful maximum occupancy is 975 (number) persons.

Sign Number 105994

81-670 (Rev. 3/81)

Appendix G



LAWFUL OCCUPANCY CERTIFICATE

CITY OF PHILADELPHIA
DEPARTMENT OF LICENSES AND INSPECTIONS
MECHANICAL SERVICES SECTION

ADDRESS: 1004-26 SPRING GARDEN ST.

BUSINESS NAME: MIDNIGHT SESSION, INC.

FLOOR AND ROOM USE: GROUND FLOOR DANCE AREA (CABARET) #5

NAME OF OWNER: SAME

ZONED FOR: G-2 INDUSTRIAL

FIRE PLAN EXAMINER: W.V.   DATE: 10-24-87

USE REGISTRATION PERMIT: ☑ Required   ☐ Not Required

BUILDING PLAN EXAMINER: R. di SIMONE   DATE: 5-9-88 ~~11-9-87~~

ZONING PLAN EXAMINER: N. S.   DATE: 10-9-87

BUILDING PLAN NUMBER OR S.O.:

☐ New Building   ☑ Alteration   ☐ Occupancy Change
☑ Other NEW USE

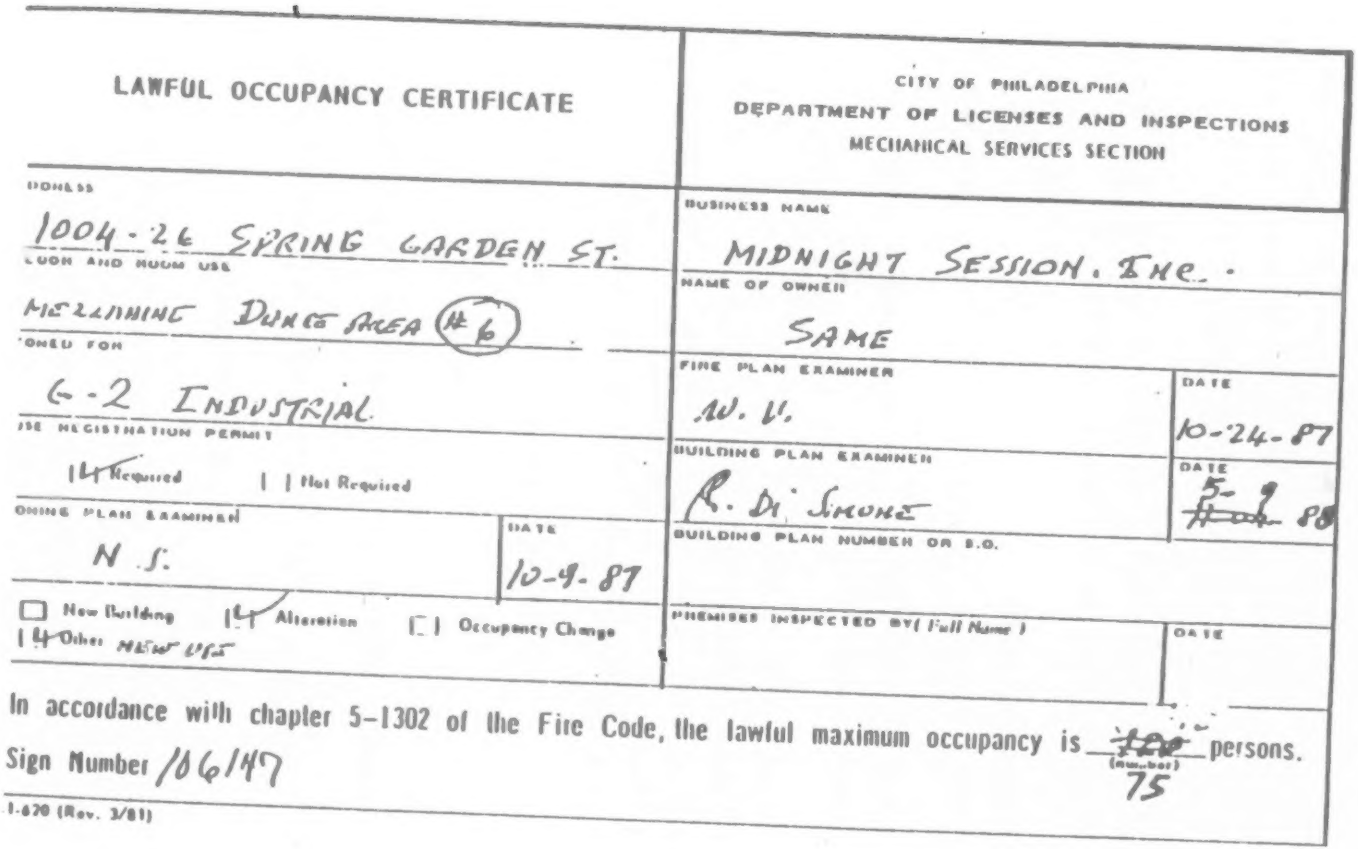
PREMISES INSPECTED BY (Full Name):   DATE:

In accordance with chapter 5-1302 of the Fire Code, the lawful maximum occupancy is ~~50~~ 270 (number) persons.

Sign Number 105993

81-670 (Rev. 3/81)

Appendix G



LAWFUL OCCUPANCY CERTIFICATE

CITY OF PHILADELPHIA
DEPARTMENT OF LICENSES AND INSPECTIONS
MECHANICAL SERVICES SECTION

DDRESS: 1004-26 SPRING GARDEN ST.

LOOR AND ROOM USE: MEZZANINE DANCE AREA #6

ONED FOR: G-2 INDUSTRIAL

SE REGISTRATION PERMIT: ☑ Required ☐ Not Required

ONING PLAN EXAMINER: N. S. DATE: 10-9-87

☐ New Building ☑ Alteration ☐ Occupancy Change
☑ Other NEW USE

BUSINESS NAME: MIDNIGHT SESSION, INC.

NAME OF OWNER: SAME

FIRE PLAN EXAMINER: W. V. DATE: 10-24-87

BUILDING PLAN EXAMINER: R. Di Simone DATE: 5-9 88

BUILDING PLAN NUMBER OR S.O.:

PREMISES INSPECTED BY (Full Name): DATE:

In accordance with chapter 5-1302 of the Fire Code, the lawful maximum occupancy is ~~120~~ 75 (number) persons.

Sign Number 106/47

1-670 (Rev. 3/81)

Appendix G

EXHIBIT P11 — TEMPORARY CERTIFICATE OF USE OF OCCUPANCY

CITY OF PHILADELPHIA

DEPARTMENT OF LICENSES AND INSPECTIONS
Municipal Services Building, Philadelphia, Pa. 19102

JOHN PLONSKI
Commissioner

DAVID L. WISMER
Deputy Commissioner

CLARENCE E. MOSLEY
Deputy Commissioner

TEMPORARY
CERTIFICATE OF USE AND OCCUPANCY

VALID FOR NINETY (90) DAYS

FOR

Location: 1004-26 Spring Garden Street Thru to Nectarine Street

An Exist.'g Part 2-story, 1-story & Mezz.'ne Structure

ACCOMMODATING

ASSEMBLY AREAS & MAINTENANCE SHOP

This building situation in the 14th Ward,
conforms with the plans approved by

Appendix G

The Philadelphia Department of Licenses and Inspections and the requirements of the current Philadelphia Building Code.
— Plan Review used 1981 edition of B.O.C.A. Building Code —

Plan Number: 3367-C-87 Application Number: 2707
Permit Number: 2707

Type of Construction: 3B

Use Group: A-2,A-3 & S-1; Assembly & Storage Uses

Location of Sprinklers: Thruout The Building

APPROVED BY:

Plan Examiners: s/ Illegible #993	Date: 04/27/88
Building Inspector: s/ Illegible	Date: 4-27-88
Housing/Fire: NA	Date: 4-27-88
District Supervisor: s/ Illegible	Date: 4-27-88

L & I file copy

Supreme Court, U.S.
FILED
MAR 27 1992
OFFICE OF THE CLERK

④

No. 91-1225

In the Supreme Court of the United States

October Term, 1991

MIDNIGHT SESSIONS, LTD. t/a AFTER MIDNIGHT, BAKER OCEAN, INC. t/a DOWN SOUTH, GOOD TIMES CAFE, INC., DONALD R. WELCH, SALLY HUNTER, JACK MANOFF, RICHARD SINGER and CURT E. HEIDINGER,
Petitioners,

vs.

CITY OF PHILADELPHIA,
Respondent.

BRIEF OF RESPONDENT, CITY OF PHILADELPHIA, IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JUDITH E. HARRIS
Acting City Solicitor
Counsel of Record
MICHAEL F. EICHERT
Deputy City Solicitor
Attorneys for Respondent

City of Philadelphia
Law Department
1530 Municipal Services Building
15th & John F. Kennedy Boulevard
Philadelphia, PA 19102-1692
(215) 686-5233

G.M.C. Printing, Phila., Pa. 215-568-4264

18

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

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1. Where pursuant to a licensing statute which provides that no license to operate a dance hall shall be issued unless the premises is a "safe and proper place," and the Police Department in making its licensing recommendation relies on its own experience in public safety matters, and also questions neighbors about their position regarding the dance hall and any reasons for their opposition, and where an administrative review board after full hearing refuses to issue the license because of the opposition of the Police and neighbors, citing the reasons for that opposition, is there any denial of the applicant's right to substantive due process?

2. Where a statute clearly provides that a dance hall must obtain a Dance Hall License before opening, and that in order to obtain a license the facility must be a "safe and proper place for the purpose for which it shall be used ....," and where full administrative and judicial review is available with all procedural safeguards including the right to counsel, the right to cross-examine witnesses, and the right to a written record giving reasons for denial of the license, is an applicant denied procedural due process because it was not expressly informed that residents who live near the proposed facility will be questioned by Police as part of their investigation process even though the applicant could have learned of this procedure by examining the records of past license hearings?

3. Is there a compensable taking where a lessee, having renovated a building for multiple uses, fails to receive a license which he knew was required for one of those uses, but all other uses remain economically viable?

TABLE OF CONTENTS

Page

Counter-Statement of the Question Presented for Review i

Table of Authorities iv

Opinions Below 1

Counter-Statement of the Case 1

Summary of Argument 4

Argument 5

I. The Third Circuit's Decision That The Licensing Scheme Provided Substantive And Procedural Due Process Is Consistent With The Decisions Of The Supreme Court And Of The Other Circuits 5

II. The Third Circuit's Interpretation of §1983 Is Consistent With The Decisions Of This Court And Of The Other Circuits 8

III. The Court Of Appeals Correctly Held That The Refusal To Grant "After Midnight" A Dance Hall License Did Not Amount To A Taking 10

CONCLUSION 12

TABLE OF AUTHORITIES

Page

Cases Cited:

Armstrong v. Manzo, 380 U.S. 545 (1965) 8

Bello v. Walker, 840 F.2d 1124 (2d Cir., 1988) 10

Board of Regents v. Roth, 408 U.S. 564 (1972) 8

City of Canton v. Harris, 489 U.S. 381 (1989) 9

Daniels v. Williams, 474 U.S. 327 (1986) 10

Eubank v City of Richmond, 226 U.S. 137 (1912) 6

Geo-Tech Reclamation Industries, Inc. v. Hamrick, 886 F.2d 662 (4th Cir. 1989) 6

Logan v. Zimmerman Brush Company, 455 U.S. 422 (1982) 8

Midnight Sessions, Ltd. v. City of Philadelphia, 945 F.2d 667 (3d Cir. 1991) 1

Monell v. New York City Department of Social Services, 436 U.S. 458 (1978) 10

Monroe v. Pape, 365 U.S. 167 (1961) 10

Pembaur v. Cincinnati, 475 U.S. 469 (1986) 9

Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978) 11

Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982) 7

Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928) 6

Statutes Cited:

42 U.S.C. §1983 ....8, 10

53 P.S. §§4731-4742 ....2, 6, 7

United States Constitution Cited:

Fifth Amendment 10, 11

No. 91-1225

In the Supreme Court of the United States

October Term, 1991

MIDNIGHT SESSIONS, LTD. t/a AFTER MIDNIGHT,
BAKER OCEAN, INC. t/a DOWN SOUTH, GOOD
TIMES CAFE, INC., DONALD R. WELCH, SALLY
HUNTER, JACK MANOFF, RICHARD SINGER and
CURT E. HEIDINGER,
Petitioners,

vs.

CITY OF PHILADELPHIA,
Respondent.

BRIEF OF RESPONDENT, CITY OF PHILADELPHIA, IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINIONS BELOW

The Opinion of the Court of Appeals for the Third Circuit (Greenberg, J.) has been reported, but the citation given by Petitioners is incorrect. The correct citation is 945 F.2d 667 (3d Cir., 1991).

COUNTER-STATEMENT OF THE CASE

The Opinion of the Court of Appeals presents an accurate description of the statutory and factual matrix which underlies this action. We therefore limit our Counter-Statement of the Case to correcting several serious misstatements and omissions in Petitioners' Statement of the Case.

In implementing the Pennsylvania Dance Hall Act, 53 P.S. §4731 *et seq.*, the City of Philadelphia requires its Police Department to investigate each application for a license so as to determine whether the proposed facility is a "safe and proper place for the purpose for which it shall be used." 53 P.S. §4736. (127a) (All page references are to the Appendix for Petitioners.) This determination is separate and distinct from questions of compliance with other City codes, such as fire and building codes, and is one which the Police are uniquely qualified to make.

In the case of Petitioners' establishment known as "After Midnight," the Police Department recommended to the Department of Licenses and Inspections (hereinafter "L&I") that Petitioners' application for a dance hall license be denied. At the time this recommendation was made, the Police had actually witnessed the problems caused by After Midnight's operations. This was because for a short time the club was open illegally, prior to receiving its license. The record before the trial court was replete with examples of the serious adverse impact on the community resulting from these operations, all of which are summarized in the Court of Appeals' Opinion. (6a)

Many of the problems witnessed by Police and neighbors had, in fact, been anticipated by members of the community and expressed to police in the months prior to After Midnight's license application. (6a) These problems, for example, noise, disorderly conduct, drinking and drugs, vandalism and traffic congestion, were again identified by neighbors when they were questioned by Police as part of the license investigation. Thus, not only did the Police know from their own observations the problems caused by After Midnight's operation, but they were able to as-certain that the opposition consistently voiced by neighborhood residents was based on an accurate perception and understanding of the nature of the club's business.

Acting on the Police Department's recommendation, L&I denied After Midnight's application for a Dance Hall License. Petitioners immediately appealed and received a full hearing before the Licenses and Inspections Board of Review (hereinafter the "Board of Review") only 11 days after the initial license denial. At the Board of Review hearing, Petitioners were represented by counsel, had the right to call whatever witnesses they chose, and to cross-examine any adverse witnesses. Testimony by the Police was that very loud music came from the club during its operations, a fight involving over 100 males had occurred, drug arrests had occurred in the immediate vicinity of the club, and there was severe traffic congestion. Numerous members of the community testified as to the bases for their opposition, in particular their fear of increased noise, traffic congestion, the sale of drugs and alcohol, vandalism, and disorderly conduct. The complete transcript of this hearing was admitted into evidence at trial.

At the close of the Board of Review hearing, the Board gave explicit reasons for its affirmance of L&I's denial of the license:

> "The Review Board indicated that the neighborhood testimony was unanimous, unwavering, and we are persuaded by the problems that seem to have arisen since the dance hall began operation in May." (7a)

With respect to the establishment known as "Down South," the Court of Appeals has quite correctly pointed out that at the time of the denial of

Petitioners' Dance Hall License application, the establishment had also been denied a Certificate of Occupancy and was not in compliance with the City Fire Code at any relevant time. (9a)

Procedurally, After Midnight appealed the Board of Review's decision to the Court of Common Pleas, but later withdrew that appeal. In the case of Down South, Petitioners did not even appeal the L&I decision to the Board of Review.

The short excerpts of trial testimony selected by Petitioners for inclusion in their Appendix show that the means were available to Petitioners to learn the nature of the Board of Review proceedings and the factors which would be considered by the Board. (190a) The testimony also showed that the review process carried out by the Board clearly distinguished between groundless neighborhood opposition and opposition which was based on valid reasons articulated to the Board. (192a)

SUMMARY OF ARGUMENT

Delegating to the Police Department the duty to determine if a facility is a "safe and proper place" for a dance hall is rational, given the Police Department's special knowledge and experience with matters of public safety. The Police practice of asking members of the community whether they oppose the license, and if so why, is also rational and not arbitrary, and certainly does not constitute a denial of substantive due process where the Police retain the final authority to recommend for or against the license, and the Board of Review retains final administrative authority to grant or deny a license. In this case, the Police had first-hand knowledge of the adverse impact caused by Petitioners' dance hall on the community's safety and welfare.

Procedural due process was provided to Petitioners by the Police documenting the reasons for opposing the license and by the availability of administrative and judicial review which afforded Petitioners the full panoply of procedural safeguards. Specifically, Petitioners had notice of Police and neighborhood opposition, had the right to cross-examine the witnesses against them, and were given written reasons for the actions of the Police Department and the Board of Review. Furthermore, Petitioners had no legitimate claim of entitlement to a Dance Hall License, because the licensing decision was subject to the discretion of the municipality as delineated by statute.

Finally, no compensable taking occurred because Petitioners had no property interest in the mere expectation of a Dance Hall License which was denied for sound reasons of state law, and also because despite denial of the license, numerous other economically viable uses of their building remained available to Petitioners.

ARGUMENT

I.

THE THIRD CIRCUIT'S DECISION THAT THE LICENSING SCHEME PROVIDED SUBSTANTIVE AND PROCEDURAL DUE PROCESS IS CONSISTENT WITH THE DECISIONS OF THE SUPREME COURT AND OF THE OTHER CIRCUITS.

The Third Circuit correctly determined that the licensing procedure followed by the City of Philadelphia was not a *per se* violation of Petitioners' right to substantive due process.

The rationality of relying on the Police Department for a determination that the proposed dance hall is a "safe and proper place" is clear from the particular facts of this case. The Police had independent, first-hand information which was itself sufficient cause for the Police to disapprove Petitioners' license application, and which also served to validate the community's stated reasons for its opposition to After Midnight.

Neither was the consideration of community sentiment in the way in which it occurred in this case a *per se* substantive due process violation. The three cases cited by Petitioners – *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 49 S.Ct. 50, 73 L.Ed. 210 (1928), *Eubank v. City of Richmond*, 226 U.S. 137, 33 S.Ct. 76, 57 L.Ed. 156 (1912), and *Geo-Tech Reclamation Industries, Inc. v. Hamrick*, 886 F.2d 662 (4th Cir., 1989) – are all distinguishable from the present case. *Eubank* involved an ordinance which on its face *required* the City to establish a building line upon petition of two-thirds of nearby property owners. In *Roberge* a zoning ordinance made the written consent of two-thirds of nearby property owners *mandatory* before the city would grant permission for the erection of a philanthropic home. The owners' decision was not constrained by any legislative standards nor was it subject to review. Finally, in *Geo-Tech*, the West Virginia Department of Natural Resources had discretion to deny a waste facility disposal permit on the basis that such a facility is "significantly adverse to the public sentiment."

All of these legislative schemes are crucially different from that in the present case where the ultimate and decisive licensing consideration is not the consent of neighbors, but instead is a police decision whether the proposed dance hall is "a safe and proper place for the purpose for which it shall be used ..." 53 P.S. §4736. This decision is subject to full administrative and judicial review at which time the basis for the Police Department's recommendation could be examined, as it was in this case, to see if it is based on legitimate factors. In light of these procedural safeguards, resulting in the clear articulation of the basis for neighborhood opposition, Petitioners' claim that they were thwarted by arbitrary and irrational neighborhood sentiment must be rejected.

Turning to the question of procedural due process, the appellate rights afforded to Petitioners are well described by the Court of Appeals (24a-33a) and need not be restated here. Petitioners' claim that they had no notice of the standards utilized in license applications, or of the role played by the community in the licensing process. However, the Dance Hall Act itself obviously imposes a license requirement independent of other city codes. Moreover, the trial record showed that these same Petitioners were familiar with the Dance Hall License process, having been through it themselves on at least one prior occasion. Finally, as stated during trial, the recorded decisions of the Board of Review were available for Petitioners and their attorneys to inspect (190a, 192a). As stated in *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982):

> "Indeed, the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry or by resort to the administrative process." 455 U.S. at 498.

Petitioners argue that post-deprivation appeal rights are inadequate to cure an alleged due process violation where a pre-deprivation process is feasible.

This is a simplistic misstatement of the law. *Logan v. Zimmerman Brush Company*, 455 U.S. 422 (1982), cited by Petitioners, involved a careful balancing of competing interests. Crucial factors were the length and finality of the deprivation in question. Here, the deprivation was of short duration. Petitioners' subsequent license reapplication for After Midnight was allowed, and was in fact successful. (7a-8a) Hence, *Armstrong v Manzo*, 380 U.S. 545 (1975), dealing with permanent termination of parental rights, is inapplicable.

As stated by the Third Circuit, Petitioners had no legitimate claim of entitlement to a license within the meaning of *Board of Regents v. Roth*, 408 U.S. 564 (1972). (25a-28a) Petitioners apparently have waived any objection to this holding as it was not raised in their Petition for Certiorari.

Finally, with respect to the argument on pages 16-18 of the Petition, it would seem sufficient at this time to point out that Down South was never in compliance with the Fire or Occupancy Codes. (44a) It is difficult to see how Petitioners believe that Down South was denied substantive due process when it did not at any relevant time satisfy the express statutory prerequisites for a Dance Hall License.

II.

THE THIRD CIRCUIT'S INTERPRETATION OF §1983 IS CONSISTENT WITH THE DECISIONS OF THIS COURT AND OF THE OTHER CIRCUITS.

Contrary to Petitioners' assertion, the Third Circuit did not hold that in order to recover under 42 U.S.C. §1983 a civil rights litigant must prove that a municipality acted with "improper motive" in enforcing a constitutionally infirm policy.

To begin with, the Court of Appeals quite clearly determined as a matter of law that the licensing scheme, on its face and as customarily applied, was not arbitrary or irrational. Having decided that the municipal policy was not constitutionally infirm, the Third Circuit went on to hold that on remand the jury must still decide the following question:

> "... whether the police in their recommendation knowingingly relied on unsubstantiated or irrational community objections, based on an improper motive, rather than some legitimate concerns such as traffic congestion, road safety, public safety, crime and noise and therefore whether or not the license was denied by the city on an improper basis." (42a)

Obviously, the improper motive to which the Court is referring is one which might exist in members of the community, not in the City or its employees.

The Court of Appeals found, as a matter of law, that the licensing scheme adopted by the City of Philadelphia was not constitutionally defective. Moreover, as pointed out above, the evidence at trial showed that the Police and the Board of Review were careful to document the reasons for the community's opposition. Petitioners had the benefit of numerous procedural safeguards during the review process. It is therefore impossible to conclude on the basis of this record that the official policy of the City of Philadelphia was one of "deliberate indifference" to the constitutional rights of license applicants. *See City of Canton v. Harris*, 489 U.S. 378 (1989) and *Pembaur v. Cincinnati*, 475 U.S. 469 (1986). The only remaining basis for liability would be a jury finding that individual City employees had deliberately abused their power, and in essence this is what the jury must decide on remand. (The City stipulated that it would be responsible for the actions of the individual defendants. See note 2 on page 9 of the Petition for Certiorari.)

The Third Circuit opinion is therefore entirely consistent with *Monroe v. Pape*, 365 U.S. 167 (1961) and *Monell v. New York City Department of Social Services*, 436 U.S. 458 (1978) and their recent progeny, such as *City of Canton*, supra, and *Pembaur*, supra. The older Court of Appeals decisions cited on page 14 of the Petition for Certiorari predate *Monell*. Thus, not only are they factually distinguishable from the present case, but they represent an older and incomplete stage of the evolving legal contours of §1983 liability. We submit that the First Circuit case of *Creative Environments, Inc. v. Estabrook*, 680 F.2d 822 (1st Cir., 1982), *cert denied*, 459 U.S. 989 (1982), relied on by the Court of Appeals in our case, and the Third Circuit's own decision in *Bello v. Walker*, 840 F.2d 1124 (3rd Cir., 1988) give a sounder statement of the law in this area.

Certainly, mere negligence on the part of the Police in conducting their neighborhood survey is not actionable under §1983. *Daniels v. Williams*, 474 U.S. 327 (1986).

III.

THE COURT OF APPEALS CORRECTLY HELD THAT THE REFUSAL TO GRANT "AFTER MIDNIGHT" A DANCE HALL LICENSE DID NOT AMOUNT TO A TAKING.

Petitioners' Fifth Amendment argument pertains only to the "After Midnight" club and concedes that the Court of Appeals correctly stated the law. Nevertheless, Petitioners argue that the appellate court did not view the evidence in the light most favorable to them, and that when so viewed it establishes that a taking did occur. Unfortunately for Petitioners, this is not the case.

Obviously, the Dance Hall License in question was never taken at all; it was simply not granted. Petitioners' own evidence showed that they had renovated the building for a variety of purposes besides dancing, among them, a restaurant, arcade, movie theater and skating rink. Their failure to obtain a Dance Hall License by no means prohibited these other uses. (21a) Thus, their contention that without dancing "After Midnight" was deprived of all "economically viable" uses is not sustainable.

Furthermore, as the Court of Appeals pointed out, Petitioners knew from the statute that they were required to have a Dance Hall License before beginning operations as a dance hall. Given this express statutory requirement, Petitioners' expectation that they had an absolute right to such a license was unreasonable. Disappointment of unreasonable hopes simply is not a taking under the Fifth Amendment. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978).

Petitioners also contend that they suffered a total, and therefore compensable, deprivation of their leasehold interests because the City's delay in granting a license caused them to fall behind in their rent and be evicted. This argument presumes that the initial denial amounted to a taking, which it did not. Moreover, the City did not evict Petitioners; they were simply unable to pay their rent. There is no authority, and Petitioners cite none, for the proposition that such a sequence of events amounts to a governmental taking.

CONCLUSION

For all of the above reasons, Respondent City of Philadelphia respectfully requests that this honorable Court deny the Petition for a Writ of Certiorari which has been filed in this case.

Respectfully submitted,

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